A HISTORY OF ENGLISH LAW

BY

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VOLUME II

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To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.

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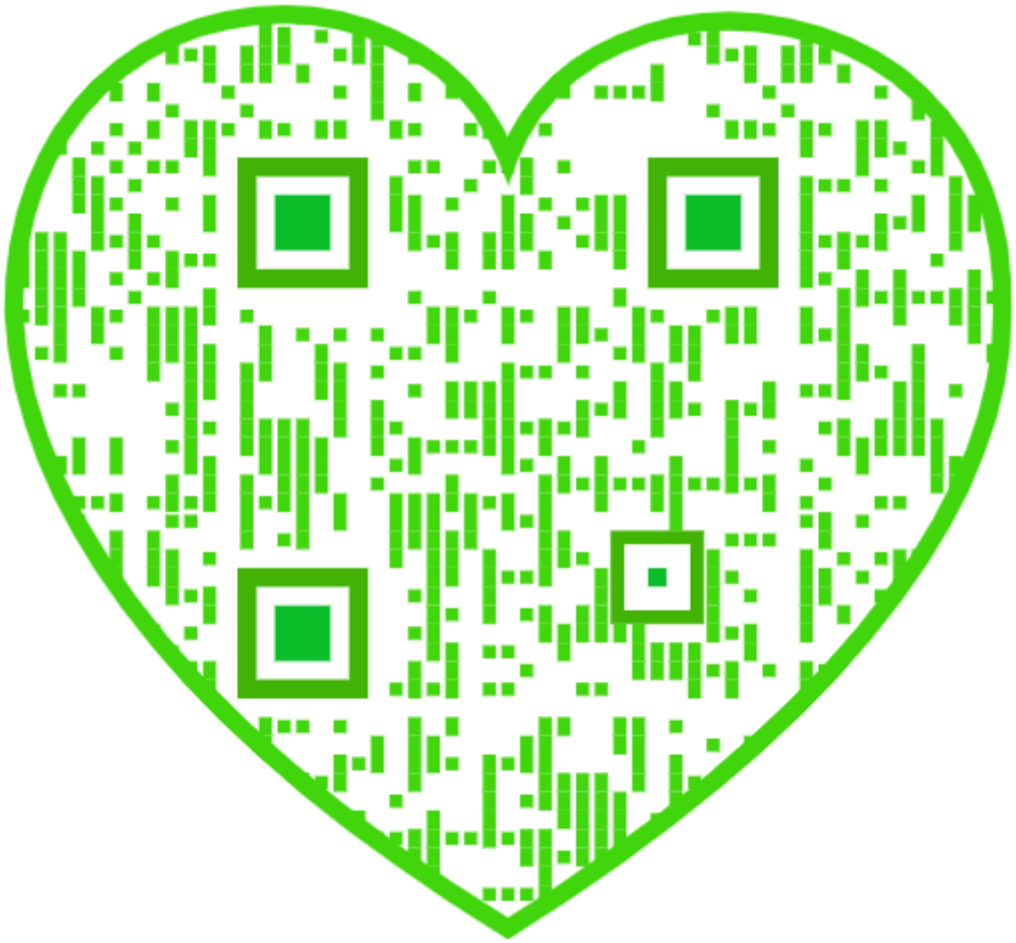

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EARL BIRKENHEAD

SOMETIME LORD HIGH CHANCELLOR OF GREAT BRITAIN

THIS WORK

IS

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RESPECTFULLY DEDICATED

PREFACE

THIS volume and the following have been considerably altered, partially rewritten, and where necessary expanded. The second volume contains ninety more pages, and the third volume one hundred and sixty-three more pages than they contained in the first edition.

During the thirteen years which have elapsed since the publication of the first edition, my knowledge of different parts of the subject has naturally increased, and I have become conscious of the inadequacy of my treatment of parts of the subject. It is for this reason that I have added introductions to Books II. and III., that I have added a new first chapter to the First Part of Book III., and that I have rearranged Chapters II. and IV. of that part. It is partly for the same reason that I have made very considerable alterations in all the chapters of Part II. of Book III. which is contained in Volume III. But these additions and alterations are due more particularly to the following reasons: Firstly, a good deal of very important new matter has been published since 1909, which has necessitated the rewriting of many parts of Volumes II. and III. Thus, to mention only the most important books, it has been necessary to take account of Maitland's Forms of Action; the work of Mr. Bolland, Sir Paul Vinogradoff, and Mr. Turner on the Year Books; the important collection of Legal Essays which were read at the legal history section of the Historical Congress of 1913; the work done in the series of Oxford Studies in Social and Legal History edited by Sir Paul Vinogradoff; Sir Paul Vinogradoff's valuable little book on Roman Law in Mediæval Europe; Mr. Woodbine's work on Bracton, and on some of the legal tracts of Edward I.'s reign; Dr. Winfield's work on

Conspiracy and cognate subjects; Miss Putman's work on the Statutes of Labourers; an important series of papers in Volume XXIX. of the Harvard Law Review by Mr. Percy Bordwell on Property in Chattels; and a book of which I ought to have made more use before—Mr. Street's Foundations of Legal Liability. Secondly, I have found it necessary both to subtract from and to add to Volume III. in order to co-ordinate the Second Part of Book III. with the Second Part of Book IV. With this object I have rewritten many of the chapters in Volume III.—notably parts of sections 5, 6 and 7 in Chapter I.; sections 5 and 8 in Chapter II.; the last part of Chapter III.; section 2 in Chapter IV.; parts of sections 2 and 3 in Chapter V.; and the whole of Chapter VI. I hope that the result will be that in the Second Part of Books III. and IV. of my History there will be found a clear account of the history of legal doctrine, in some cases down to the beginning of the eighteenth century, and in many cases down to modern times.

In these two volumes, as in the first volume, the number of pages allotted by my publishers has been exceeded. It is due to the liberality of the Honourable Societies of Gray's Inn, Lincoln's Inn, and the Middle Temple, that I have been able to include the extra pages needed to obtain completeness of treatment.

I again have to thank Dr. Hazel, my successor in the All Souls Readership of English Law in the University of Oxford, and Reader in Constitutional Law and Legal History in the Inns of Court, for the benefit of his criticism, and help in correcting the proof sheets; and Mr. Costin, Fellow and Lecturer in History at St. John's College, Oxford, for making the list of statutes.

All Souls College, Oxford
October, 1922

PLAN OF THE HISTORY

(Vol. I.) BOOK I.—The Judicial System: Introduction. Chap. I. Origins. Chap. II. The Decline of the Old Local Courts and the Rise of the New County Courts. Chap. III. The System of Common Law Jurisdiction. Chap. IV. The House of Lords. Chap. V. The Chancery. Chap. VI. The Council. Chap. VII. Courts of a Special Jurisdiction. Chap. VIII. The Reconstruction of the Judicial System.

(Vol. II.) BOOK II. (449-1066)—Anglo-Saxon Antiquities: Introduction. Part I. Sources and General Development. Part II. The Rules of Law: § 1 The Ranks of the People; § 2 Criminal Law; § 3 The Law of Property; § 4 Family Law; § 5 Self-help; § 6 Procedure.

BOOK III. (1066-1485)—The Mediæval Common Law: Introduction. Part I. Sources and General Development: Chap. I. The Intellectual, Political, and Legal Ideas of the Middle Ages. Chap. II. The Norman Conquest to Magna Carta. Chap. III. The Reign of Henry III. Chap. IV. The Reign of Edward I. Chap. V. The Fourteenth and Fifteenth Centuries. (Vol. III.) Part II. The Rules of Law: Chap. I. The Land Law: § 1 The Real Actions; § 2 Free Tenure, Unfree Tenure, and Chattels Real; § 3 The Free Tenures and Their Incidents; § 4 The Power of Alienation; § 5 Seisin: § 6 Estates; § 7 Incorporeal Things; § 8 Inheritance; § 9 Curtsey and Dower; § 10 Unfree Tenure; § 11 The Term of Years; § 12 The Modes and Forms of Conveyance; § 13 Special Customs. Chap. II. Crime and Tort: § 1 Self-help; § 2 Treason; § 3 Benefit of Clergy, and Sanctuary and Abjuration; § 4 Principal and Accessory; § 5 Offences Against the Person; § 6 Possession and Ownership of Chattels; § 7 Wrongs to Property; § 8 The Principles of Liability; § 9 Lines of Future Development. Chap. III. Contract and Quasi-Contract. Chap. IV. Status: § 1 The King; § 2 The Incorporate Person; § 3 The Villeins; § 4 The Infant; § 5 The Married Woman. Chap. V. Succession to Chattels: § 1 The Last Will; § 2 Restrictions on Testation and Intestate Succession; § 3 The Representation of the Deceased. Chap. VI. Procedure and Pleading: § 1 The Criminal Law; § 2 The Civil Law.

(Vol. IV.) BOOK IV. (1485-1700)—The Common Law and Its Rivals: Introduction. Part I. Sources and General Development: Chap. I. The Sixteenth Century at Home and Abroad. Chap. II. English Law in the Sixteenth and Early Seventeenth Centuries: The Enacted Law. (Vol. V.) Chap. III. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—International, Maritime, and Commercial Law. Chap. IV. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—Law Administered by the Star Chamber and the Chancery. Chap. V. English Law in the Sixteenth and Early Seventeenth Centuries: The Development of the Common Law. (Vol. VI.) Chap. VI. The Public Law of the Seventeenth Century. Chap. VII. The Latter Half of the Seventeenth Century: The Enacted Law. Chap. VIII. The Latter Half of the Seventeenth Century: The Professional Development of the Law.

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BOOK II

(449-1066)

ANGLO-SAXON ANTIQUITIES

A HISTORY OF ENGLISH LAW

INTRODUCTION [1]

WHEN the Western Empire was overwhelmed by the barbarians it did not wholly perish; and the fact that some of the political, legal and religious ideas to which it had given birth survived to influence its conquerors has moulded the whole future history of the nations of modern Europe. In the period which stretches from the fifth to the eighth centuries the combination of these ideas with the archaic usages of the barbarians produced results which varied in different parts of Europe according to the completeness with which the invaders overthrew the ancient civilization. Generally in Italy and the countries bordering on the Mediterranean the influence of that civilization was stronger than in those countries of Northern Europe which had never been completely brought under the Roman sway, or which Rome had abandoned. The barbarian conquerors allowed the conquered inhabitants to keep their law, and only applied their own tribal customs to themselves. Thus in Southern Europe there were still many who lived according to the rules of Roman law; [2] and though the study of Roman law was decadent, it never wholly perished.[3] But many parts of Germany, Denmark, and Scandinavia had never come under Roman rule; and Britain, though it had been for more than three centuries a Roman Province, had been abandoned in 407. In the following centuries the completeness of the conquest of Britain by various tribes of Teutonic invaders,

[1] Carlyle, A History of Mediæval Political Theory, vols. i and ii; Maitland, A Prologue to a History of English Law, L.Q.R. xiv 13 seqq., and P. and M. (2nd ed.) i; Bryce, Holy Roman Empire.

[2] L.Q.R. xiv 23-24; "the forcible entry of the Goths, Lombards and Franks into the provinces did not in any sense involve the disappearance or denationalization of the Roman inhabitants. The legal status of the latter was allowed to continue," Vinogradoff, Roman Law in Mediæval Europe 15; for the complicated system of personal laws which consequently grew up see ibid 16, where the tale told by Bishop Agobard of Lyons (about 850), to the effect that it often happened that five persons meeting in one room might all be bound by different laws, is recalled.

[3] Below 135.

and the subsequent settlements by the Danes, made England so substantially a Teutonic country, that we must begin the continuous history of England and of English law with the coming of those tribes to England in 449.[1]

Historians, both of England and of other countries of Europe, have, as we shall see,[2] differed greatly as to importance of the different racial elements—Teutonic, Roman, and Celtic—in the making of the history of their respective countries. But we shall see that the importance of these controversies has been exaggerated. During the long period which stretches from the fifth to the eleventh century two sets of influences had been making for the growth of a certain amount of uniformity in the political and legal ideas of Western Europe. In the first place, even in those parts of Europe where the Roman Eagles had never flown, some of the political and legal ideas of Rome were introduced by the one institution of the later Roman Empire which had retained its vigour—the Christian Church.[3] In the second place, in the ninth and tenth centuries the governments of the different peoples of Western Europe were unable to make full use of these political and legal ideas, because these ideas were too much in advance of the stage of civilization to which these peoples had attained. These two sets of influences combined to produce a form of government and a body of laws of a kind which are quite distinct, on the one hand from the earlier tribal laws of the barbarian tribes, and on the other from those later systems of the civil and canon lawyers, and from those local bodies of customary feudal law, which governed Europe in the later mediæval period.[4]

Let us glance for a moment at the nature of these influences which in England as elsewhere shaped the legal history of this period.

Where the Church penetrated it introduced ideas of political organization, of law, and of morality far higher than those possessed by the barbarian tribes; and its influence naturally made for a uniformity of ideas upon these matters throughout Western Europe. But these ideas were introduced into loosely knit tribal societies of barbarians, the institutions and ideas of which were very primitive. From the mixture of the institutions and ideas inherited from the older civilization, with the institutions and ideas of the barbarian tribes, there emerged most of

[1] Below 12-14. [2] Below 13-14.

[3] "Even where there was no numerous Roman population to represent the Roman racial element, the clergy at least followed Roman Law, and many rules of the latter were adopted for their practical utility," Vinogradoff, Roman Law in Mediæval Europe 19.

[4] Below 133-142.

the political and legal institutions and ideas of the later Middle Ages. Whence, then, came these institutions and ideas which the Church spread over Western Europe in these centuries, and what was their nature?

These political and legal institutions came from the Roman Empire; and the political and legal ideas upon which the Empire rested were passed on to the modern world by the writings of the Roman lawyers and the Christian Fathers. They were therefore expressed in legal terms; but they were coloured by Christian theology; and they were modified both by the ideas of that theology and by contact with the institutions and ideas of the barbarians.[1] If, therefore, we would understand the resulting product we must consider the contribution made by each of these three elements.

(i) Law touches national life on all its sides; and to the study of law a large part of the intellect of the Roman Empire was devoted. So we find in the writings of the Roman lawyers[2] opinions expressed upon questions both of political and legal theory which have had a very continuous influence throughout the whole course of modern history. It is true that the Roman lawyers were not political philosophers; but partly because they reproduced the ideas current in their age, partly because there is little discussion of these ideas except in their writings, they have exercised almost as great an influence upon political as upon legal thought; and, because they were lawyers, their treatment of these topics is coloured by a legalism, which, as Maine has noted,[3] has always been a characteristic both of the political, the ethical, and the theological speculation of Western Europe.

The Roman lawyers took for granted the universal rule of the emperor; but in their eyes his universal rule was founded on consent. It is true that the emperor was all powerful—"Quod principi placuit legis habet vigorem"; but it was because the people would have it so—"cum lege regia, quæ de imperio ejus lata est, populus ei in eum omne suum imperium et potestatem concessit."[4] Following the views held by Cicero and Seneca,[5] they held that the aim of the state was the promotion of justice, and that the law was the instrument which the state used to attain that end. Law therefore was the means by which justice was secured; and therefore knowledge of law—juris prudentia—was "divinarum atque humanarum rerum notitia, justi atque

[1] "The political theory of the Middle Ages is founded upon the theory represented by the Roman lawyers from the second to the sixth century, and by the Christian Fathers from the second to the seventh century, while it is modified by the constitutional traditions and customs of the Teutonic races," Carlyle, op. cit. i 3.

[2] Ibid op. cit. i Pt. II.

[3] Ancient Law 340-359.

[4] Just. Instit. 1, 2, 6.

[5] Carlyle, op. cit. Pt. I.

injusti scientia."[1] The universe over which the emperor ruled was governed by law; and all—even the emperor—should obey it. But, naturally, if the conception of law is given so wide an extension, it is necessary to distinguish between different varieties of law. There was the jus naturale, which some jurists held to be the law common to all living creatures, but which most held to be that ideal body of right and reasonable principles which was common to all human beings. It taught that all human beings were free and equal—a conception which was suggested partly by Stoic theories, partly by the cosmopolitan character which the Roman Empire was assuming. It is because the existence of a law aiming at these high ideals was clearly set forth in the writings of the Roman lawyers, that it became the synonym for the many varied legal and political ideals, which, in many different ages, have floated before the minds of statesmen and legislators.[2] Then there was the jus gentium—the law common to all peoples—which fell short of the ideal jus naturale, notably in its failure to attain the ideals of freedom and equity; but which naturally tended to become confused with it. Quite apart from these two bodies of law there was the law of the particular state which could be made and changed by the emperor as representing the state. The idea that the state could freely make and change its law is the mark of an advanced stage of political development; and it was not the least important of the ideas that the Roman lawyers bequeathed to the modern world.

(ii) The Christian Fathers naturally adopted these ideas, partly because they were the ideas of the legal system under which they lived, partly because they fitted in well with their system of theology. But they gave them a theological colouring and therefore they somewhat modified them in the process. Moreover, the position which the Church occupied, firstly in the Empire, and secondly in relation to the barbarian tribes which overthrew the Empire, raised new political problems for which no solution could be found in the writings of the classical jurists.

The leading ideas of the Christian Fathers[3] were adapted from those of the Roman jurists. Naturally they asserted that the aim of the state was the promotion of justice and the law of God. Naturally they asserted that all men were equal before God. Naturally they identified the ideal jus naturale of the Roman lawyers with the law of God. Thus the idea that the universe was ruled by law was strengthened. And just as the Church adapted the legal and political ideas of the Roman lawyers, so it tended to imitate the political organization of the

[1] Just. Instit. 1, 1, 1.
[2] Below 123-124, 251, 444, 569; App. II.
[3] Carlyle, op. cit. i. Pt. III.

Empire. Just as the dominion of the emperor was all-embracing, just as the Empire had one head, so the Catholic faith must embrace all Christians, and must have a single head at Rome.[1] Just as the Empire had its law so must the Church have its law.[2] Just as the emperor could make and change law so could the head of the Church.

In some respects the teachings of the Church added greatly to the strength of existing political institutions. The Church held that the state was a divinely appointed remedy for sin; and the same explanation served as a defence of the institution which seemed most contrary to its teachings—slavery. Resistance to the ruler of the state was thus a sin as well as a crime. But it insisted that these rulers were bound by the laws of God; and it was constantly placing before them the ideals of justice and equity and obedience to law.[3] Naturally, as the law of the Church took more definite shape, the idea arose that even the emperor, and of course all other rulers, were subject to the law of the Church. But there is a wide distinction between the theoretical teachings of the Roman lawyers that all men—even the emperor—were subject to the rule of law, and the claim of a Church, which was becoming organized on the model of the Empire, to force emperors and rulers to obey the law.[4] Church and State had become separate powers; and they were thus placed in a position of rivalry which they had never occupied in the ancient world. Thus a wholly new problem arose—the relation of Church and State. In this period it did not give rise to any very acute controversies. It was agreed that both had their several spheres; and they had not as yet begun to define the boundaries of those spheres in such a manner as to provoke conflict.[5] As yet, both in England and abroad, Church and State worked together for the most part harmoniously.[6] But the seeds of future conflicts between these rival powers had been sown;[7] and these conflicts, when they came, did not make for the stability of the state.

(iii) These ideas inherited from the law and the religion of the Roman Empire gradually opened a new vista of knowledge to the barbarian tribes who eventually overthrew it. Many of

[1] L.Q.R. xiv 15.

[2] "Theology itself must become jurisprudence, albeit jurisprudence of a supernatural sort, in order that it may rule the world," L.Q.R. xiv 16.

[3] Below 131-132, 253-254, 435.

[4] L.Q.R. xiv 16.

[5] Carlyle, op. cit. i c. xxi.

[6] Ibid; for England, see below 22-24.

[7] "It is clear that the ninth century simply carries on from the sixth the principle of the two authorities in society—two authorities which are theoretically independent of each other in their own spheres; but the experiences of the ninth century tended to bring out the difficulties of this position, and to develop the tendency towards the assertion of the priority of one or other of the two," Carlyle, op. cit. i 257.

them had long been in contact with the Roman civilization—"The Romanization of the provinces, and the barbarization of Rome"[1] had been proceeding apace for some centuries before the fall of Rome. "Whole nations, such as the Burgundians, the Visigoths, the Ostgoths, the Franks, were admitted as allies within the limits of the Empire, and quartered in the provinces in a way that made them practically masters of a third, sometimes even of two-thirds of the land."[2] This process of assimilation prevented them from entertaining the idea of destroying the Empire. On the contrary, many were content to take titles from the emperors and to rule nominally as their delegates.[3] The crowded cities, the great buildings, the roads, the aqueducts and other engineering triumphs, the luxury and the ordered government of the Roman provinces, astounded the barbarian mind. They tended to foster the idea that the dominion of Rome was both universal and eternal;[4] and, even in those parts of Europe where Roman civilization had been destroyed, this idea was propagated through the influence of the Church. Both in England and elsewhere the barbarian chiefs called themselves by high-sounding titles, and found that the legal and political ideas of Rome which had come through the Church added both to their dignity and their authority. But, naturally, these legal and political ideas were affected by their contact with the institutions and ideas of the barbarians. The rules of Roman law became debased;[5] and contact with the political institutions of the barbarians produced a modification in political ideas which was destined in the future to have important consequences. Most of these barbarian tribes were governed by a chief and some sort of national assembly. Their law was unwritten customary law declared in their assembly; and when the king, influenced by the political ideas of the older civilization, began to make written codes of this customary law, and even to make new law, it was by the counsel and consent of these assemblies that these laws were promulgated. Obviously this tended to modify the Roman idea that the emperor was the sole source of law, and to strengthen the idea that the ruler of the state was as much bound by law as his subjects.[6] It tended to make men think that he was bound not only by divine law or jus naturale, but also by the law of the state.

The dissemination of these political and legal ideas of the ancient world from the fifth to the ninth centuries made for the moral, intellectual and political progress of the new world. We

[1] Vinogradoff, Roman Law in Mediæval Europe 4.
[2] Ibid 5.
[3] Bryce, op. cit. 17-19.
[4] Ibid 20-22.
[5] Below 133-135.
[6] Carlyle, op. cit. i 235-239.

can see this progress in Anglo-Saxon England in the eighth and ninth centuries;[1] and we see it on a larger stage in the kingdom of the Franks. Though the Roman Empire had in fact dissolved, a new Holy Roman Empire was arising. The Popes at Rome had succeeded in establishing throughout the Western Europe a spiritual dominion over the faithful, which claimed to be as universal and as eternal as the secular dominion of the Roman Emperors. With the Popes the Franks, because they were orthodox Catholics, were closely allied; and this alliance was profitable both to the Popes and to themselves. They had helped the Pope against the Saracens; and, on the other hand, the Catholic priests had helped them in their struggles with Arian Goths and Burgundians. Naturally the Pope turned to them for help against his foes, the Lombards. The Carlovingian Mayors of the Palace were quite prepared to help; and in return the Pope deposed the last of the Merovingians and declared Pipin king. Pipin delivered the Pope from the Lombards, and was given by the Pope the rank of Patrician. On Pipin's death the Lombards again attacked the Pope; but his son Charles the Great, at the call of Hadrian I., again came to the rescue, and secured for himself the crown of Lombardy. In 798 Hadrian's successor Leo III. was attacked by enemies in Rome itself. He escaped with difficulty, and appealed to Charles for his help. Charles responded to the call, and restored the Pope who, in return, crowned Charles Emperor.[2]

The restoration of the Empire is the central point in the history of this early mediæval period. It represented the culmination of the influence of those ideas of the ancient world which the Church had used to civilize its barbarian conquerors. It was the victory of the ideas which made for law, order and civilization. The empire of Charles was indeed a very different empire from that older empire which men thought had been restored. It was as Bryce has said, "The most signal instance of the fusion of the Roman and Teutonic elements in modern civilization."[3] But there can be no doubt that this restoration both helped to secure the immediate victory of those ideas of the ancient world which made for order and progress, and gave them a permanent future.

The position of Charles the Great was strengthened by the bestowal upon him of the title of emperor. He gained all the half legendary prestige of the older emperors. Like them, he became the temporal head and centre of the world, and as such, bound, in conjunction with the Pope its spiritual head, to use

[1] Below 17. [2] Bryce, op. cit. c. iv. [3] Op. cit. 2-3.

his power to execute justice and maintain truth. In fact the restoration of the Empire by the Pope did for Charles in a dramatic fashion and on a European stage what the teachings of the Church were doing for many rulers in a less ostentatious way and on a smaller stage. It increased the powers of king and state to suppress disorder, and to promote the forces which were making for civilization. In England the same influences helped the great kings of the West Saxon house in their work of making a united country.[1] But undoubtedly the most important effect of the restoration of the Empire was the large influence which it had upon the whole future course of mediæval and modern history. The fact that the Empire had once been restored in this form was an event which was never forgotten in the dark days which followed the death of Charles. It furnished an ideal to which men were bound to turn again, so soon as the forces of order began again to prevail over the forces of anarchy.[2]

The history both of Europe and of England during the ninth and tenth centuries showed that the victory of these ideas was premature. To secure their permanent victory a far more elaborate governmental machinery was needed than was as yet possessed by any of the tribal communities which peopled Europe. Even the Church had as yet no such machinery; and the need for it was as much beyond the comprehension of any of the nascent European kingdoms, as the possibility of establishing it was beyond their powers. All as yet depended on the military abilities of the ruler. And so, when the ruler failed, the state proved to be incapable of defending itself against foreign foes, or of suppressing domestic disorder. The forces of order had triumphed when Charles the Great was crowned Emperor. The forces of disorder triumphed under his successors. The century which followed his death was the "nadir of order and civilization" in Europe.[3] Consequently it is the period when the feudal system was formed because, in default of any central government, it was through feudalism alone that any semblance of order could be kept.[4] The older civilizing influences seemed to have lost their power. The study of Roman law declined—it was read only in epitomes or epitomes of epi-

[1] Below 15-16, 23.

[2] "Depuis le régne de Charlemagne on s'etait habitúe à regarder la plupart des peuples et des Etats de l'Europe comme unis entre eux par des liens communs, malgré les différences qui les separaient: l'empire, la religion, le clergé, la langue latine, tels etaient ces liens; le droit romain vint s'y ajouter. Dés lors on ne le considera plus comme le droit particulier des Romains, ou comme la propriété exclusive d'un seul Etat, mais comme le droit commun de l'Europe chrétienne," Brissaud, Histoire du droit Français i 196, citing Savigny, History of Roman Law iii 68.

[3] Bryce, op. cit. 78.

[4] Vol. i 17-18.

tomes.[1] Charles the Great's legislation was forgotten. The local customs of small districts ruled by feudal chiefs reigned supreme.[2] The Papacy had never been more corrupt. The leaders of the Church were often little better than feudal potentates, and the parish priests often sank to the low level of their parishioners. In England, it is true, the forces of disorder did not triumph so completely as they triumphed abroad.[3] But in England, as elsewhere, there was distinct retrogression.[4] It was the period of Danish invasions, and, as in other European countries, of the growth of feudalism. "The grand vision of a universal Christian empire was utterly lost in the isolation, the antagonism, the increasing localization of all powers, it might seem to have been but a passing gleam from an older and better world."[5]

But the forces of order and progress which had made this ideal possible were not wholly destroyed; and, during the tenth century, the prevailing disorder was gradually mitigated by the development of the feudal system. The restoration of the Empire by Otto I. and his successors, and the reform of the Papacy which was affected by these emperors, once more gave an opportunity for the revival and development of those political and religious ideals upon which the future of Western Europe depended. The attempt to realize them gave rise, as we shall see in the following period,[6] to political and legal developments and theories which have permanently influenced the political and legal thought of modern Europe.

During this period, then, the foundations of the systems of law of the states of Western Europe were laid in a world governed partly by the remnants of Roman law, but chiefly by barbarian custom tempered by Christian theology, and by those political and legal ideas of the Roman lawyers which the Church had perpetuated. To the history of the manner in which the foundations of our modern English law were laid under these diverse influences we must now turn.

[1] L.Q.R. xiv 19; below 133-135.

[2] "Dans le cours du xe siècle, les Capitulaires tombent dans l'oubli: quelques-unes de leurs prescriptions subsisteront seulement en passant dans la coutume. . . . Pour le droit seculier il fut une periode . . . ou la loi n'existait plus, et où tout etait reglé par la coutume. . . . La féodalité avait crèè, dans le royaume, un nombre immense de justices absolument souveraines; chacune d'elles eut au debut sa coutume particulière," Esmein, Histoire du droit Français (11th ed.) 784.

[3] Below 17.

[4] Below 16-17.

[5] Bryce, op. cit. 79.

[6] Below 121-124.

PART I

SOURCES AND GENERAL DEVELOPMENT

ENGLISH law has a long memory; but to that memory there is a definite limit. Unhappily, the historian of English law cannot take the benefit of this period of limitation. We have seen that it must be transcended if we are to understand the origin and growth of the judicial system round which our law has been developed. It is still more necessary to transcend it if we are to understand the material at the disposal of the judges of the courts of common law who, in the twelfth and thirteenth centuries, laid the foundations of that common law. In fact, it is difficult to assign a limit to the antiquarian excursions it is necessary to make in order to find a starting point. It cannot indeed be maintained, with some of our old chroniclers, that English history must begin with the history of Brutus, the great-grandson of Æneas.[1] The better opinion is that we cannot date the definite beginnings of the common law much earlier than the first half of the twelfth century. But though we do not see the definite beginnings of the common law much before that date, it is nevertheless necessary to go back behind the Norman Conquest for the origin of many of its rules. These rules of the Saxon period were, it is true, administered and shaped by Norman lawyers; and, if we are to understand the shape which they gave to them, we must often look to the Roman and Canon law. But to understand the rules themselves we must go back to the Saxon period. Without some knowledge of that period we cannot understand the law of the twelfth and thirteenth centuries. In this Book, therefore, I shall give some account of English law in the Saxon period.

By beginning the history of the substantive rules of English law with the coming of the Saxons to England I assume that these rules are almost entirely Teutonic—that they did not in

[1] For an account of the legend which made this Brutus the ancestor of the Britons, see Plummer's edition of Fortescue, Governance of England 185.

their origin contain any appreciable admixture of either Celtic or Roman elements. It is right to say that upon this subject there has been a large amount of learned controversy. Some writers, for instance Coote and Seebohm, would assign a large share to Roman and Celtic usages. But the balance of recent opinion is not in favour of this view. Stubbs, Freeman, Sir Paul Vinogradoff, Sir F. Pollock, and Maitland hold the view that the Anglo-Saxon law was, in the main, purely Teutonic. And in support of this view two very strong reasons can be adduced. In the first place, there is no proof that there is in it any admixture of Celtic custom. The fact that Celtic and Teutonic usages coincide in small particulars proves nothing. "The mere coincidence of particulars in early bodies of law proves nothing beyond the resemblance of all institutions in certain stages."[1] And, if we can trace customs or superstitions beyond the date of the Saxon invasions, they are usually of no importance except to the student of folklore or to the lover of antiquarian minutiæ.[2] Length of years may, in the case both of persons and of customs, denote far-reaching influence. But it may be that the years are long because the situation is obscure. Antiquity alone confers no historical importance. In the second place, there is no proof of any survivals from the period of the Roman occupation. We do know that the Latin language and the Christian religion disappeared from England for a time; and Bede tells us that, after the conquest of England, the original home of the Angles was left desolate.[3] This clearly throws the burden of proof upon those who assert that there has been continuity.

It has been attempted to connect the agricultural community of the tenth century with the Roman villa.[4] But it cannot be said that this thesis is proved; and, as a rule, if we can trace

[1] P. and M. i xxix; Stubbs, C.H. i 71, 72, says, "If the agreement between the local machinery of the Welsh Laws and the Anglo-Saxon usages were much closer than it has ever been shown to be; if the most ancient remains of Welsh law could be shown not to be much younger in date than the best established customs of Angle and Saxon jurisprudence; the fact would still remain that the historical civilization is English and not Celtic. The cantred of Howeldha may answer to the hundred of Edgar, but the hundred of Edgar is distinctly the hundred of the Franks, the Alamannians, and the Bavarians. If the price of life and the value of the compurgatory oath among the Welsh were exactly what they were among the Saxons, it would not be one degree less certain than it is that the wergild of the Saxon is the wergild of the Goth, the Frank, and the Lombard. The Welsh may in late times have adopted the institution from the English, or in all the nations the common features may be the sign of a common stage of civilization;" cp. Vinogradoff, Manor 117-122.

[2] See Elton, Origins of English History, chap. xii; Gomme, The Village Community, chap. ix.

[3] Bede i 15.

[4] Seebohm, The Village Community; Ashley, Origin of Property in Land, Introd.; Earle, Introduction to Land Charters xliv-lxiv; see also E.H.R. iv 353-359.

any rules of Anglo-Saxon law to the Roman law, we shall find that we can account for their presence by the influence of the Church. The conversion of England was effected partly from Rome, the English Church was organized wholly from that source, and during all this period the two Churches were more or less closely related. The ecclesiastical traditions of a Church which, on the continent, lived "secundum legem Romanam," which in England was peculiarly closely connected with the state, necessarily influenced the law of the state. Abroad it was the contact with the older civilization which produced those codifications of barbaric custom known as the "leges barbarorum"; and we see the same phenomenon in England. Æthelbert of Kent was the first of the English kings to be converted to Christianity; he was the first to reduce to writing the customary laws of the state; and this he did "juxta exempla Romanorum."[1] If the idea of written laws, perhaps of writing itself,[2] came from Rome, it is clear that a few Roman elements in Anglo-Saxon law will not prove any survival of Roman influence from the period of the Roman occupation.

The Saxon period covers about six centuries. It begins with the landing of the Jutes in the Isle of Thanet in 449; and it ends with the battle of Hastings in 1066. Counted in years it is a long period—almost as long a period as that which separates the reign of Edward I. from the reign of Edward VII. In a sense it is an important period. England was colonized by varied races of Teutonic invaders; and the Teutonic element was strengthened in the ninth and tenth centuries by successive Danish invasions. In some sort the government of the country was organized. Certain rules of law were recognized which, if they are not the actual foundation of the common law, at least contributed one of the most considerable of its elements. But we must allow that this period possesses far more importance to the historian of the law of the twelfth and thirteenth centuries than to the historian of our present law. The building which the lawyers of the twelfth and thirteenth centuries erected upon this foundation has been so restored and enlarged in the course of eight centuries of continuous development that it has come to rest almost entirely upon new and different foundations. For, as Selden says, our laws "are not otherwise than the ship that by often mending had no piece of the first materials, or as the house that is so often repaired *ut nihil ex pristina materia supersit* which yet (by the civil law) is to be accounted the same still."[3] Just as the rules of International law, founded originally upon an imaginary recon-

[1] Bede ii 5. [2] Elton, Origins of English History 378 n. 2.
[3] Selden, notes to Fortescue, *De laudibus* c. xvii.

struction of the childhood of the race, supplied a basis for rules of humanity and convenience;[1] so the law of the Anglo-Saxons, founded on primitive and even barbarous ideas, supplied a basis for the development of a reasonable system of law. We reject now the original basis; but we must take some account of it if we are to understand the origins of the actually existing law.

This period of English history may be divided into the following three epochs.

The first epoch stretches from 449 to 800. During this period the country was settled by various bands of Angles, Saxons, and Jutes; and during this period they were converted to Christianity. The numerous small states which they founded gradually gave place to the three larger states of Wessex, Mercia, and Northumbria. As we have seen, it was not till some time after the Norman Conquest that all trace of this division disappeared from the law.[2] In the year 800 Wessex became supreme under Egbert.

The second epoch stretches from the year 800 to 1017. The greater part of the ninth century was covered by the invasions of the Danes. Their invasions were so successful that for a time they seemed likely to conquer the whole of England. Alfred (871-901) stemmed the tide. But the Danes succeeded in making good their position in the northern and eastern parts of the country. Alfred's treaty with Guthrum in 885[3] left London in the hands of Alfred, and divided England into two parts by a line which ran up the Thames to the Lea, up the Lea to its source, thence to Bedford, and up the Ouse to Watling Street. The northern and eastern side of this line was left to the Danes, the southern and western to the Saxons. The Danes were a kindred race to the Saxons. But we shall see that terminology and the social condition of the northern and eastern parts of England long bore the impress of the Danish settlements; and that the Dane-law was recognized in the laws of Henry I. as one of those separate groups of custom which made up the English law.[4] The first three-quarters of the tenth century saw the reassertion of the supremacy of Wessex over the whole of England under Edward (901-925), Athelstan (925-940), Edmund (940-946), Edred (946-955), Edwy (955-957), and Edgar (957-975).

[1] Maine, International Law 22, 23. [2] Vol. i 3, 4; below 152-154, 173.

[3] Plummer, Life and Times of Alfred 108, 109.

[4] Below 153; see Chadwick, Studies in Anglo-Saxon Institutions 198-201, for the various meanings which the term possessed at different periods; and Vinogradoff, English Society in the Eleventh Century 4-11, for instances of this Scandinavian influence; though, as he says, ibid 478, "The differences between English and Scandinavian arrangements turn out to be differences in degree and period, not in the essence of institutions."

It was during this period that the country was organized. The system of communal courts was definitely established. The king and Witan were recognized as having authority over all England. We may, perhaps, recognize some few efforts to establish an organized executive. The levy of Danegeld under Ethelred the Unready perhaps shows that the later Anglo-Saxon kings had made some efforts in this direction. Those efforts were not permanently successful. The Anglo-Saxon kings may have had a Chancery; but it was a secretarial rather than an administrative department.[1] Although the intercourse with the continent may have made the kings of England familiar with the comparatively centralized system of government established in Charlemagne's empire,[2] this influence made rather for an increase in the style and dignity of the king[3] than for any attempt to make that dignity felt through organized institutions. The efficiency of the government still depended upon the person of the king. Edgar and Dunstan could not effect what was effected by William I. and Lanfranc. The weakness of Ethelred the Unready (979-1014) left the country exposed to fresh invasions of the Danes. England submitted to Sweyn in 1013. Though Ethelred was restored in the following year; though Edmund Ironside succeeded in dividing the kingdom with the Danes; Cnut was recognized as king in 1017.

The third epoch stretches from 1017 to the Norman Conquest in 1066. The Danish invasions under Sweyn and Cnut differed from the first Danish invasions. The result of the first Danish invasions had been the colonization of the northern and eastern parts of England by bands of Danish settlers. The result of the second Danish invasions was to put a Dane upon the English throne. Cnut's aim was to found a Scandinavian empire of which England was to be the centre. He occupied the throne of the West Saxon kings, and he ruled as their successor. In 1042 the West Saxon dynasty was restored. But under Edward the Confessor the government was almost wholly in the hands of the house of Godwine.[4] The election of Harold to the throne (1066) gave the crown to the house which had long ruled England. With his defeat and death at the battle of Hastings a new epoch begins in English history.

[1] Below 24; Green, Conquest of England note pp. 542-548; Stubbs, C.H. i 242.

[2] For instances see H. and S. iii 486-487, 496, 533, 561, 621; for a discussion of the whole subject see Stubbs, C.H. i 274-278.

[3] Stubbs, C.H. i 205 says, "Edmund and his successors take high-sounding titles borrowed from the Imperial court; to the real dignity of the king of the English they add the shadowy claim to the empire of Britain, which rested on the commendation of the Welsh and Scottish princes."

[4] For the distribution of the earldoms in his reign see Freeman, Norman Conquest ii App. G.

During this period the influence of the older civilization which came through the Church, made for the growth of governmental machinery and of law. We have seen that during this period the growth of the courts of hundreds and shires, the institution of the frankpledge, and the increasing importance of king and Witan, point to a certain amount of political progress.[1] We shall see that there is a similar progress in the rules of law.[2] But we have seen that England had, like the rest of Europe, become feudalized. This, as we have seen,[3] meant the growth of private jurisdictions which rendered the nascent organization of government wholly ineffective, and effectually prevented the growth of a national law. In England, it is true, the breakdown of government in the ninth and tenth centuries was not so complete as on the continent. The latter part of the ninth, and the tenth centuries are marked on the continent by a cessation of legislation. "The French historian will tell us that the last capitularies which bear the character of general laws are issued by Carloman in 884, and that the first legislative *ordonnance* is issued by Louis VII. in 1155."[4] We shall see that there was much legislation in England during this period;[5] and this shows that in England the process of feudalization never attained during this period the completeness which it attained in France. But the same causes were operating in England as were operating on the continent. Naturally therefore the political and social conditions in England and on the continent were not dissimilar. The larger landowners exercised political power over their dependents; and the land was cultivated by a more or less servile population. Names and details are different. But it is clear that in England as elsewhere feudal conditions prevailed. Whether in its origin the agricultural community was a servile community derived from the Roman villa, or whether, as is far more probable, it was a body of independent freemen, we can see, over a large part of England in the eleventh century, the manors of lords cultivated by a more or less dependent peasantry. The circumstances of the barbarian conquests in England and in Gaul were very different. They were far more different than the social and political condition of the two countries at the time of the Norman Conquest. Whatever view, therefore, we take of the completeness of the Saxon conquest of England, whether or not we can discover any appreciable survivals of Celtic or Roman civilization, we must admit that any survivals which there may have been, had very little influence on later English history; for in England in the eleventh century, a set of political and social conditions was emerging not dissimilar

[1] Vol. i 5-17. [2] Below Part II. [3] Vol. i 17-24.
[4] Maitland, L.Q.R. xiv 28-29. [5] Below 20.

to those which were emerging in the other countries of Western Europe.

For this reason we can regard the modern controversies between the Roman and the Teutonic schools in England and abroad in much the same way as we regard the controversies, once fashionable, as to the manner in which William I. could be said to be the *conqueror* of England—"The adherents of modern parties," says Reeves,[1] "did at one time warmly interest themselves in the decision of a point, which they considered as involving consequences very material to the political opinion they avowed." As we shall see later, the continuity of English history has led to the practice of using its facts as material for the construction of arguments upon leading cases in constitutional law, or upon current political topics;[2] and the practice is not confined to England.[3] The desire to prove some racial, social, or constitutional thesis generally leads to the attempt to prove it by historical precedents. In simpler times the attempt will perhaps lead to the forging of a charter. In more modern times it will lead to the construction of an historical theory. At the present day a larger knowledge of history and a more undisguised reliance upon the expediency of the stronger are tending to banish from politics these appeals to the antiquities of history. But in the cause of exact knowledge historians still construct their theories, and fight on with the weapons of greater precision which advancing knowledge affords. These battles of modern historians do, however, result in some permanent gain. They are waged primarily in the cause of learning; and they have gradually increased our knowledge of the political and intellectual conditions under which our forefathers lived. But this we shall see more clearly when we have examined the authorities for and the sources of the rules of law prevailing during this period.

Throughout Western Europe, then, the development of legal rules during this period was coloured both by the ideas of the older civilization which came through the Church, and by the growth of feudal conditions. They are the chief influences apparent in the various authorities for and sources of English Law. These authorities and sources I shall describe under the follow-

[1] H.E.L. i 56.

[2] Macaulay's Miscellaneous Works, Essay upon History, "this is at present the state of history. The poet laureate appears for the Church of England, Lingard for the Church of Rome. Brodie has moved to set aside the verdicts obtained by Hume; and the cause in which Mitford succeeded is, we understand, about to be reheard."

[3] Vinogradoff, Villenage in England, Introd. 6, 7, "The curious literary by-play to the struggle of political party which Aug. Thierry has artistically illustrated in France from the writings of Boulainvilliers and Dubos, Mably and Lézardière, could certainly be matched in England by a tale of the historical argumentation of Brady, or Petyt, or Granville Sharp."

ing heads:—The Anglo-Saxon Codes; Ecclesiastical Influences; the Land Charters; Contemporary Codes of Law and Literary Works. From a description of these various authorities and sources we can construct some sort of picture of the political, social, and intellectual conditions in which the rules of law contained therein or originating therefrom were gradually evolved.

The Anglo-Saxon Codes[1]

The earliest code of Anglo-Saxon law was not published till the end of the sixth century. For the law of the period before we can only conjecture from what we know from other sources about the customs of the Germanic tribes, and try to connect this knowledge with the information which we have of later periods in Anglo-Saxon history. We have no definite information before the codes; and even when we get the codes a large, perhaps the largest, part of the law was contained in the customs of the county, which, as need arose, were declared in the county court.[2]

These codes, like the Leges Barbarorum of the continent,[3] enacted the customary law of the tribe. Unlike them, they were written not in Latin but in Anglo-Saxon. They take for granted a mass of unwritten custom, the contents of which can only be guessed at from incidental hints, from foreign analogies, and from later survivals. They were suggested in the first instance by the new civilization and the new ideas as to law which came with Christianity. Later codes were called forth by the necessities arising from political changes in the state.

We have seen that the conversion of Kent under Æthelbert produced the earliest code of written law. The laws of Ine marked changes of organization in the West Saxon kingdom. The laws of Alfred, Athelstan, Edmund, and Edgar marked the necessity of some legislation in consequence of the Danish settlements, and in consequence of the consolidation of the power of the West Saxon house over the whole of England. In the same way the change of dynasty when Cnut came to the throne necessitated a restatement of the law.[4] The compilations of Saxon custom which were produced by the Norman Conquest I shall describe in the following Book.[5] They are valuable because they draw a picture of the Saxon law as it appeared to the conquering Normans just before it was rendered obsolete by the reforms of the Norman and Angevin kings.

[1] The best edition of these codes is Liebermann, Die Gesetze der Angelsachsen; others are Thorpe, Ancient Laws and Institutes of England (Rec. Com.); Schmid, Die Gesetze der Angelsachsen.

[2] Vol. i 8; see English Society in the Eleventh Century 92-96 for some illustrations.

[3] Below 31-32. [4] Stubbs i 224. [5] Below 151 154.

The actual codes of Anglo-Saxon law can be grouped as follows:—

(i) The laws of the Kentish kings.[1] This group comprises the laws of Æthelbert (596), the laws of Hlothære and Ædric (685-686), and the laws of Wihtræd (690-696). They differ in many respects from the other collections of Anglo-Saxon custom. Some of these differences were noted by the compiler of the laws of Henry I.[2] In much later times the custom of Kent differed, and in fact still differs, from the law of the rest of England. We cannot fully account for all these differences.[3] It is easier to see why Kent obtained a code of laws a century before any other Saxon kingdom. It was the first to come in contact with the continent after the Saxon invasions. Æthelbert married Bertha, a daughter of the Frankish king. Thence followed the mission of St. Augustine and the conversion of the country.

(ii) The West Saxon codes. The earliest of these codes are the laws of Ine[4] (688-725). The most important are the laws of Alfred, which are a compilation and a selection from the laws of his predecessors.[5] These laws were added to by Edward the Elder, Athelstan, Edmund, Edgar, and Ethelred II. A document styled *De institutis Londoniæ* contains certain rules of law enacted by Ethelred II. for London.[6] The so-called laws of Edward the Confessor were compiled, as we shall see, after the Norman Conquest.[7]

(iii) The Laws of Cnut.[8] These are a comprehensive code designed for the Saxons and the Danes. Cnut was the last great legislator of the Anglo-Saxon kings. To this cause we owe the two Latin versions of Cnut's laws—the *Consiliatio Cnuti* and the *Instituta Cnuti*—which were made after the Conquest.[9] As we shall see, a collection of laws made after the Norman Conquest, called the *Quadripartitus*, gave the greatest prominence to Cnut's law.[10]

[1] Thorpe i 2-43; Liebermann 1-12.

[2] Leg. Henr. 76. 7; for these laws see below 152-153.

[3] Vol. iii 262-263.

[4] Thorpe i 102; Liebermann 15-88, 137-269.

[5] Thorpe i 59; Alfred himself in the preface to his laws explains the method of their compilation: "I then Alfred, king, gathered these together, and commanded many of those to be written which our forefathers held, those which to me seemed good; and many of those which seemed to me not good I rejected them by the counsel of my Witan, and in otherwise commanded them to be holden; for I durst not venture to set down in writing much of my own, for it was unknown to me what of it would please those who should come after me. But those things which I met with, either of the days of Ine my kinsman, or of Offa king of the Mercians, or of Æthelbryht, who first of the English race received baptism, those which seemed to me the rightest, those I have here gathered together, and rejected the others."

[6] Thorpe i 300; Liebermann 232.

[7] Below 154.

[8] Thorpe i 358-376; Liebermann 271-308.

[9] For these versions see below 152.

[10] Below 152.

In addition to these codes of Anglo-Saxon custom there are certain private compilations which come mainly from the eleventh century. Among these are tracts relating to wergilds according to the North people's and the Mercian law,[1] to the ranks of the people,[2] and to the forms of oaths in legal proceedings.[3] Two tracts known as the Rectitudines singularum personarum[4] and the Gerefa[5] describe the various classes of persons on an estate, and give some information as to its management.

All these codes of Anglo-Saxon custom represent a primitive state of society. We can see that society is to a great extent organized on the principle of kindred. The payment of the wergild which must be made to the kin of a slain man if the blood feud is to be stayed, the pecuniary compensations due for various injuries, occupy in the earliest code almost the whole space. In the later codes we can see that society is becoming more organized. We can trace the institutions of township, hundred, shire, and Witan. We can see that the king is growing in power. But we can see also that the state is becoming feudalized. Power is tending to pass into the hands of the wealthy classes. The old distinctions based on blood are giving place to the newer distinctions based on wealth or royal service. The country is becoming definitely organized upon a manorial system. Great estates are arising, worked by the labour services of free but dependent tenants.[6] But rules of law based upon older principles live on side by side with the new principles, and with the new rules of law called into being by an altered state of society.

Ecclesiastical Influences

The English Church was organized and settled by Theodore of Tarsus in 664. Its organization preceded that of the English state. With the Church came literature, science, and art.[7] In the seventh and eighth centuries the literary culture of Northumbria was probably unequalled in Europe. Connexion was maintained with Rome and the continent. English missionaries

[1] Thorpe i 186, 191; Liebermann 458, 463.
[2] Ibid i 190; ibid 462.
[3] Ibid i 178; ibid 396.
[4] Ibid i 431; ibid 444.
[5] Cunningham, Growth of English Industry and Commerce (ed. 1905-1907) i 571-576; Liebermann 453.
[6] Vol. i 23-24, 28-30.
[7] Bede iv 2, "Isque (Theodore) primus erit in Archiepiscopis cui omnis Anglorum Ecclesia manus dare consentiret. Et quia litteris sacris simul et sæcularibus ambo erant instructi congregata discipulorum caterva, scientiæ salubris quotidie flumina irrigandis, eorum cordibus emanabant; ita ut etiam metricæ artis, astronomiæ et arithmeticæ ecclesiasticæ disciplinam inter sacrorum apicum volumina suis auditoribus contraderent. Indicio est quod usque hodie supersunt de eorum discipulis, qui Latinam Græcamque linguam æque ut propriam in qua nati sunt norunt,"

went forth to convert the heathen. English ecclesiastics corresponded with foreign ecclesiastics. Their letters usually contain requests for mutual intercession, and sometimes for loans of books.[1] The affairs of the English Church were discussed at general councils of the Church at Rome.[2] English bishops took part in such councils.[3] Papal legates appeared in England.[4] Popes corresponded with English kings.[5] The English Alcuin was a prominent figure at the court of Charlemagne. The invasions of the Danes did not stop this intercourse. As Stubbs says, "English gold is as ingenuously asked for and as freely bestowed as it continues to be for ages after. English manuscripts are borrowed of which there is no mention of return. Few and far between are the notices of Englishmen in continental authors, but nevertheless there are traces of a continuous and lively intercourse which might be multiplied by closer examination and might yield an important harvest to patient labour."[6] We expect therefore to find that the church exercised some influence over Anglo-Saxon law; and the more so because, during this period, the close unity between church and state prevented the growth of a separate system of ecclesiastical courts. It may be that the church exercised a separate disciplinary jurisdiction over its own members, and perhaps a separate jurisdiction over the causes of the poor.[7] But often ecclesiastical canons and secular laws are hardly distinct. It is often difficult to say whether an assembly is a synod or a Witan.[8] It has been pointed out that the form taken by the theology of the Western Church was coloured by ideas drawn from Roman law.[9] It is not surprising that a church which had grown up under the shadow of the Roman Empire should develop and define the vague customs of the barbarian tribes, and add to their scanty stock of legal ideas. On the other hand, the church was influenced by its environment. Here, as abroad, it adopted the system of wergilds, and gave its sanction to the methods of proof by compurgation and ordeal.[10]

[1] H. and S. iii 398, 400, 431, 439. [2] Ibid 131. [3] Ibid 140.
[4] Ibid 443. [5] Ibid 75, 78, 83, 110, 262, 314, 521.
[6] Memorials of St. Dunstan (R.S.) cxxxi, cxxxii.
[7] Theodore's Pœnitential II. ii 4 (H. and S. iii 191), "Episcopus dispensat causas pauperum usque ad L solidos, rex vero si plus est."
[8] H. and S. iii 465, 512, 596; cp. the scriptural introduction to Alfred's laws, and some of the laws of Edgar and Cnut, Thorpe i 44-59, 244, 262, 358.
[9] Above 5; Wharton, Angl. Sacr. ii 6; Vinogradoff, Roman Law in Mediæval Europe 25.
[10] Dialogue of Egbert (H. and S. iii 404), the first question is, "Si necessitas coegerit in quantum valet juramentum episcopi, presbiteri, vel diaconi, sive monachi?" To which the answer is, "Ordines supradicti, secundum gradus promotionis, habeant potestatem protestanti;" see the whole of the passage; Esmein, Histoire du droit Français 187; Seebohm, Tribal Custom 385.

The influence of the church and the church's law upon Anglo-Saxon law was the influence of a more civilized upon a less civilized law. In such cases the tendency is to use the rules of the more civilized body of law to fill up the gaps which the smallest political development will disclose in the less civilized body of law. This phenomenon has been observed in our own days in India and Japan.[1] We shall see that it occurs again in the use made of Roman law by the lawyers of the king's court in the twelfth and thirteenth centuries.[2] Perhaps, too, the priests of the new religion may have converted to their own use the sanctity formerly possessed by the priests of the older faith,[3] just as they appropriated and sanctified many of the pagan festivals and observances.[4] However that may be, we can see clearly four different directions in which the church directly influenced the development of the law.

(i) The teaching of the church tended to add a new sanctity to the person of the king, and, through the king, to the authority of the state. The church, as I have said, had inherited some of the political ideas of imperial Rome.[5] This does not mean that the church always preached what we may call, in the language of later times, the divine right of kings, and the doctrines of passive obedience and non-resistance. Churchmen rebuked, and wisely rebuked, the vices of kings.[6] It cannot, however, be doubted that the influence of the church added a sanctity and a dignity to the royal office which made for the cause of law and order.[7] If we compare the position of the king in the earlier period with his position in the later codes of Anglo-Saxon law, we can see that he is coming to be thought of as the head and representative of the state, the defender of the church, the protector of the oppressed, the vicegerent of Christ.[8]

[1] Maine, Village Communities 74-76; for Japan see below 178.

[2] Below 177-178, 269-270, 285-286.

[3] Seebohm, Tribal Custom 120, "The missionary monks or priests, it might almost be said, *naturally* took the place of the Druids in the minds of the people. They had the power to shut out the criminal from the sacrifices of the Christian altar, just as the Druids could from theirs. The conversion, such as it was, meant at least that in the belief of the people the spiritual powers were transferred to the priest, and that the old sanctions of superstition naturally followed the transfer. Thereby was secured to the church something of the same prestige and power which had once belonged to the priests of the older religion."

[4] Lecky, History of Rationalism i 36.

[5] Above 6-7.

[6] H. and S. iii 350, 488, 793, 796.

[7] Ibid 447 seqq., the decrees of the legatine synods; see the titles *De officio regis*, and *De ordinatione et honore regum;* in another title the king is expressly put on a level with the kings and emperors of old time, "Fraus, violentia, et rapina vetantur et ne injusta et majora tributa Ecclesiæ Dei imponantur, quam *lex Romanorum et antiqua consuetudo priorum imperatorum regum et principum habeant;*" cp. Carlyle, Mediæval Political Theory in the West, chap. xvii; Figgis, Divine Right of Kings (1st ed.) 18, 19.

[8] See e.g. Ethelred v 10, 21; vi 13, 26; ix 2, 42; Cnut (Ecclesiastical) i 20, (Secular) 13; Edward the Confessor 18; Leg. Henr. 10. 2; 19.

(ii) We shall see that stress laid by the church on motive and intention tended to modify in some small degree the archaic notions as to legal liability for wrongdoing which we find in the Anglo-Saxon codes.[1]

(iii) The church introduced the conception of the last will. The Germans when Tacitus wrote knew not the will.[2] The ecclesiastical origin of one of its forms is illustrated by a passage in the Dialogue of Egbert (732-766). The question is asked whether a priest or a deacon should be a witness "verborum novissimorum quæ a morientibus fiunt de rebus suis." The answer is that there should be always two or three other witnesses lest the relatives of the deceased dispute the will.[3]

(iv) In England, as abroad, the church introduced the custom of conveying land by written documents. The "Boc," or written charter, by which land or privileges are conveyed, is ecclesiastical in its origin. It is used in England only by the king, the church, or by very great men;[4] and the later Anglo-Saxon kings employed it extensively. Mr. Stevenson says,[5] "It is only by the supposition of the existence of a trained and organized body of royal clerks, corresponding to the Chancery of the continent, that we can account for the highly technical way in which the old English royal charter is drawn up. From at least the time of Æthelstan these royal clerks possessed an elaborate system of formulæ, slightly more elastic it may be than that of the Frankish Chancery, but still a system that argues the presence of specially trained clerks." There are signs at the latter end of the Saxon period that the use of writing to convey interests in land was spreading. The written "læn" of land for a definite term is coming into use.[6] But in England this use of writing to convey interests in land never became common among all classes. We do not get in England, as we get on the continent,[7] "precedents in conveyancing." Religious houses may, it is true, have taken hints from collections like that of Marculfus. The practice never became sufficiently usual to produce the growth of any similar collections of common forms.

[1] Below 53-54.

[2] Germania xx, "Successoresque sui cuique liberi et nullum testamentum."

[3] See the passage cited below 95 n. 7.

[4] P. and M. ii 252; Domesday Book and Beyond, 242-244; below 68, 70.

[5] E.H.R. xi 731.

[6] Below 70-71.

[7] Esmein, op. cit. 126-127, "Les recueils des formules sont peutêtre les plus instructifs. Ce sont des modèles d'actes, dressés d'avance, pour servir aux practiciens qui étaient appelés à en rédiger de réels. . . . De nombreuses collections de ces formules sont parvenues jusqu'a nous; mais, pour une seule, on connût le nom de l'auteur; ce sont les formules du moine Marculfe."

It is to this last influence exercised by the church that we owe one of the most important of all the authorities for Anglo-Saxon law—the Land Charters.

The Land Charters[1]

The charters are concerned for the most part with the conveyance of land, or of various privileges—jurisdictional or fiscal—over the land. As I have said, no clear distinction seems to be drawn at this period between the conveyance of land and the conveyance of privileges.[2] Occasionally also they convey other things; for instance, iron mines,[3] saltworks,[4] pasturage,[5] tithes,[6] rents,[7] and in one case vestments.[8] The conveyances themselves are varied in character. They take the form not only of grants, but also of confirmations of pre-existing grants,[9] exchanges,[10] or wills.[11] Incidentally also they evidence the custom of pledging or mortgaging land.[12] The interests conveyed are as various. They convey the grantor's whole interest for ever, giving the grantee the fullest power of disposition in his lifetime or by will,[13] or they convey an interest for one or more lives only,[14] or they restrict the descent to certain heirs;[15] and, where such restricted interests are given, the grantor will sometimes make further provision dealing with his reversionary interest.[16] The conveyances are sometimes gratuitous. This is usually the case where land or privileges are granted to a church or a monastery.

[1] Kemble, Codex Diplomaticus (1839-1848); Thorpe, Diplomatarium Anglicum Ævi Saxonici (1865); Earle, Land Charters (1888); Birch, Cartularium Saxonicum (1885-1893); E. A. Bond, Facsimiles of Ancient Charters in the British Museum (1873-1878); Facsimiles of Anglo-Saxon Manuscripts (1878-1884); Napier and Stevenson, The Crawford Charters (1895).

[2] Vol. i 19, 20. [3] Birch i 107, no. 73. [4] Ibid i 202, no. 137.

[5] Ibid i 251, no. 175. [6] Ibid ii 83, no. 483.

[7] Ibid i 560, 562, nos. 403 and 405. [8] Ibid ii 374, no. 685.

[9] Ibid i 55, no. 33; ii 136, no. 521; iii 397, no. 1146. Cp. ibid ii 258, no. 603, in which King Eadward (A.D. 903) makes a record of a deed which had been lost by fire.

[10] Ibid i 110, no. 76.

[11] Ibid i 49, no. 29; ii 86, no. 486; iii 74, no. 912; 215, no. 1012; 373, no. 1132; 432, no. 1174.

[12] Ibid iii 284, no. 1064; Napier and Stevenson 76.

[13] E.g. ibid iii 62, no. 902, "ut habeat ac possideat quamdiu vivat et post se cuicunque voluerit æternaliter derelinquat."

[14] E.g. ibid iii 344, no. 1111, "ego Oswald. . . . Wulfrico æternaliter concessi, et post vitæ suæ terminum duobus quibus voluerit cleronomis derelinquat eorumque item finito curriculo ad usum primatis in Weogorna ceastre redeat inmunis."

[15] E.g. ibid ii 478, no. 754, "et post obitum sui heredes et posteri illius quamdiu unus ex illa geneologia superfuerit."

[16] E.g. ibid i 297, no. 209, "Ego Offa . . . Riddan meo ministro . . . concedo; hac tamen conditione interposita ut dierum illius termino uxorisque suæ Bucgan nec non etiam filiæ ejus Heburgæ habeant terram illam jure dominationis, et post dierum illorum conclusionem etiam rus prænominatum cum libro descriptionis hujus ad monasterium quod nominatur Breodun in Huic reddatur."

In such cases the grantor usually states that he makes the grant "pro remedio animæ meæ et parentum meorum"—or for some other cause of a similar kind. Sometimes the grant is to a king's thegn, homo, decurion, vassal, or miles,[1] or other official such as an apparitor,[2] a huntsman,[3] or a chamberlain;[4] in these cases the consideration, if not expressed,[5] must generally be presumed to have been for past or for continuous present services. Sometimes the transaction is a sale.[6]

It is clear therefore that these charters illustrate most directly the land law of the Anglo-Saxons. In particular they illustrate the extent to which feudal conditions were beginning to prevail in England for causes not altogether dissimilar to those at work on the continent. It is true that they are immediately concerned only with the transactions of the great and powerful. But it is such transactions which will always be the most important part of the land law of any country; and we can sometimes (with the assistance of contemporary statements[7] as to agricultural customs) read between the lines, and learn something of the condition of the humbler inhabitants of the land.

But it is not only the land law of the Anglo-Saxons that these charters illustrate. As I have said, they convey other things beside land; and we have seen that they shed great light upon the growth of private jurisdiction among the Anglo-Saxons.[8] It may be said, indeed, that they illustrate all parts of Anglo-Saxon law and history. In the recitals which they contain, explaining the reason for a grant or the title of the grantor, we get sidelights upon criminal and constitutional law.[9] In the narratives of legal proceedings which even at that remote date might form a link in a chain of title, we get information as to procedure, more especially as to the procedural value in litigation of the land charters themselves.[10] The manumissions which are found among them show the existence of slaves all through this period.[11]

[1] Birch iii 332, no. 1099; 336, no. 1103; 55, no. 895; 446, no. 1183.
[2] Ibid ii 30, no. 449. [3] Ibid iii 156, no. 968.
[4] Ibid iii 313, no. 1083; 357, no. 1120.
[5] Ibid iii 357, no. 1120, a grant by Edgar to his chamberlain "pro obsequio ejus devotissimo." This seems to have been the common form used by Edgar.
[6] Ibid i 378, no. 271; iii 490, no. 1212.
[7] Ibid iii 102, no. 928—Survey and Customs of Tidenham; 382, no. 1136—letter of Oswald, bishop of Worcester, to King Edgar setting forth the nature of the leasehold tenures of the church lands of Worcester in the Hundred of Oswaldslaw: for this letter cp. Domesday Book and Beyond 304-307, and below 70-71.
[8] Vol. i 20, 21.
[9] Birch ii 435, no. 727; iii 274, no. 1055; 372, no. 1131; 474, no. 1198. Napier and Stevenson 6, 67.
[10] Below 114-116. [11] Birch ii 315, no. 639; iii 536-538, nos. 1245-1254.

In fact, the charters are valuable because they show the law actually at work. To the short rules of the Anglo-Saxon codes they are what our case law is to our statute law—what an abstract of title is to the general principles of the law of real property. By thus presenting a picture of the working of the law they help us to a better knowledge of the customary law, and to a better understanding of the codes. They show, perhaps, that in actual practice many transactions were possible which are not hinted at in the laws themselves. They illustrate in the most striking way—by presenting a series of illustrations—the extent to which the use of writing, and the contact with an older and more civilized legal system, had strengthened the power of the law and enlarged the circle of legal ideas. No doubt the contact between the older customary law and the newer legal ideas, as seen in the Anglo-Saxon land-book, is often grotesque.[1] It does not follow that it is not instructive. To induce the lawless man to imitate legal methods is to induce him voluntarily to pay some homage to the law; and to have produced this result is to have overcome what the Anglo-Saxon codes show us is the most formidable difficulty which a primitive body of law must meet.

The charters themselves are usually written upon parchment; and sometimes two or three copies were made upon one parchment. In this case the word "Cyrographum" was often written across the line where the parchment was divided;[2] and this, like the indenting of the later deed, served the purpose of proving the identity of the copies.

The ordinary land charter will generally consist of the following parts: (1) The Invocation, "In nomine Dei," etc. The omission of this is evidence of forgery or mutilation.[3] (2) The Proem. This consists of general moral or religious observations as to the transitory nature of this world and its possessions, and the desirability of laying up treasure elsewhere, or otherwise caring for one's soul. They tend to grow more elaborate after the tenth century, and to become in many cases somewhat conventional; but they never become entirely common form, as among the Merovingians and Carlovingians. In

[1] As Maitland picturesquely puts it, "The process that is started when barbarism is brought into contact with civilization is not simple. The hitherto naked savage may at once assume some part of the raiment, perhaps the hat, of the white man. . . . Even so when our kings of the eighth century set their hands to documents written in Latin and bristling with the technical terms of Roman law, to documents which at first sight seem to express clear enough ideas of ownership and alienation, we must not at once assume that they have grasped these ideas," Domesday Book and Beyond 225.

[2] Earle xliii.

[3] Kemble, C.D. i ix; Earle xv. See vol. iii App. III. for specimens of charters.

England there was no profession of clerks, nor, as we have said, do we get books of precedents.[1] (3) The Grant.[2] The grant contains the names of the grantor and grantee and often the motive for the grant. It often defines the extent of the grant—the "estate" granted; but it does not follow that the charter contains all the terms to which the grantee is bound.[3] A large proportion of these grants are royal, and up till about the middle of the ninth century the consent of the Witan is usually recited. After that date there is usually no mention of such consent.[4] The granting words are generally simpler than those of the continental forms.[5] The subject matter of the grant is often described in solemn words which are similar in most respects to those used in other parts of Europe.[6] The boundaries of the land granted are often minutely described, sometimes after the grant, sometimes separately at the end of the charter. Earle says that it is "the continuation of an old Roman usage, the formulæ of which may be seen in the book of Hygenius, the land surveyor. It is the formula used by the agrimensores of the Empire when they had to describe irregular ground which did not well admit of their rectangular system of mensuration and allotment."[7] (4) The Sanction.[8] The charter usually closes with particular and comprehensive curses, consigning to eternal damnation (often with much picturesqueness of detail) all and sundry who attempt to disturb the gift. This clearly marks the ecclesiastical origin of these instruments, and separates them from the analogous continental documents, which usually threaten a pecuniary penalty for any disturbance of the gift.[9] (5) The Date.[10] The earlier method of calculating the date was by the year in the Indiction—that is, a cycle of fifteen years. These cycles were calculated from A.D. 312—"the first year of Constantine's undivided empire."[11] The present method of calculating dates by the year of our Lord was invented by a Scythian monk named Dionysus Exiguus in A.D. 532.[12] It was adopted by Bede; and at a Council held in 816 it was provided that the

[1] Kemble i x-xx; Earle xv-xviii. [2] Ibid i xx-xxxiv; ibid xix-xxiii.
[3] Below 70. [4] Earle xxi; Domesday Book and Beyond 247, 248.
[5] Kemble i xxvii. [6] Ibid xxxvi, xxxvii.
[7] Earle xxvi; but cp. E.H.R. iv 358. [8] Kemble i lxiii; Earle xxv.
[9] Kemble i lxiii gives the following form from Marculfus, "Si vero, quod futurum esse non credimus, aliqui de heredibus nostris, vel quicunque, contra hanc interdonationem, unde inter nos Chartas uno tenore conscriptas firmavimus, venire aut infrangere voluerit, nullatenus valeat vindicare; sed inferat partibus vestris, cum cogente fisco, auri libras tantas, argenti tantas; præsens vero epistola in nullo possit convelli, sed firma et inlibata permaneat." Cp. vol. iii App. III. for the Anglo-Saxon form.
[10] Earle xxi-xxxvi. [11] Ibid xxxv.
[12] For this Dionysus see below 138; cp. L.Q.R. xiv 20.

Acts of the Synod should be dated in this manner. As Earle says, such a provision shows that the practice was not then fixed. From this date, this modern method of dating documents became general.[1] In many cases we find both methods of calculating the date used in the same charter. (6) The Signatures.[2] The charter is always signed by the grantor, and by numerous other persons, either as consenting parties or as witnesses. The signatures are not autograph. They are written opposite to a cross which was used to testify consent. Seals did not become usual for such documents till the custom of using them for this purpose was introduced, with other Norman customs, by Edward the Confessor. There is evidence that the Saxons had seals which they used for other purposes. Indeed, two of the matrices of such seals are preserved at the British Museum.[3]

The charters deal with transactions which purport to have taken place between the seventh and the eleventh centuries. As a rule the conveying part is in Latin, while the boundaries are in Anglo-Saxon. But in the later documents large portions, and sometimes the whole document, are in Anglo-Saxon. Of the Anglo-Saxon documents, some are in the Kentish dialect, some in the West Saxon. Owing to the harrying of the North by the Danes in the ninth century, and by William I. in the eleventh century, we find nothing in the Northumbrian dialect.[4] No doubt some of these documents are original. But a very large part we only have at second-hand; and in all, whether original or second-hand, it is necessary to be keen to detect the hand of the forger. The second-hand documents come from all centuries of English history, from the eleventh to the fifteenth.[5] In many cases they were preserved, remodelled, or perhaps concocted, in the Chartularies of the religious houses whose title deeds they constituted. They are to be distinguished from the genuine originals by both philological and historical tests. Thus, the style of the Latin or the Saxon used; the use of continental terms not known in England till after the Conquest; explanations of old usages; a too frequent introduction of historical events contemporary with the assumed date—are all signs of the forger's work. It does not follow, however, that such forged charters are valueless either for legal or for historical purposes.[6] The charter, though obviously by a later hand, may be a recension or a

[1] Earle xxxiii, xxxiv; Napier and Stevenson 45, 46; for further details as to the later history of the manner of calculating dates see Norton, A Treatise on Deeds 150-152.

[2] Earle xxxvi.

[3] Ibid xxxviii-xl; and see E.H.R. xxvii 6, 7.

[4] Earle cii, ciii.

[5] Ibid cvi-cx; Napier and Stevenson 37.

[6] Earle xli-xlii.

translation of old materials. We have direct evidence that the old Anglo-Saxon charters were thus translated and edited by the compiler of the Ramsey Cartulary.[1] Such documents are, in fact, often rather abstracts than forgeries—bearing the same relation to the genuine documents as a modern abstract of title bears to the original deeds. But undoubtedly, when all allowances have been made, there are many charters which were simply forged in order to afford evidence of a title perhaps real, perhaps supposed.[2] We see the same thing on the continent. Professor Napier and Mr. Stevenson[3] describe the manner in which a Westminster charter was concocted from a genuine charter of Edgar, from a later forged charter of Edgar, from a charter of Dagobert to the abbey of St. Denis, from a spurious letter of Nicholas I. to Charles the Bald in favour of St. Denis, and from Chlodwig II.'s confirmation of the rights of St. Denis. They add, "The monks of Westminster imitated the example of their brethren at St. Denis in fabricating charters, for, in addition to the present one, they forged about the same time the great charter of Dunstan, two charters of Edward the Confessor . . . and a charter of William I. dated 1067. It cannot be said, however, that they attained anything like the success of their continental exemplars, for their forgeries, besides being much less numerous than those of St. Denis, are much less skilful productions."

The legal history of England from the eleventh to the fourteenth century will supply a sufficient reason for such forgeries—the monks would have said an abundant justification. We have seen that the crown was able to keep a tight hand over its feudatories. Enquiries such as the Domesday survey of the eleventh century,[4] and the Quo Warranto proceedings of the thirteenth century,[5] made it very advisable to be able to show a clear documentary title to lands or franchises. For this reason clear written evidence of the sort demanded by the royal commissioners must be manufactured if it was not at hand. If the crown would have clear written evidence of rights for which a prescriptive title—often a long prescriptive title[6]—could alone be shown, the crown should have it. The monasteries contained many clerks. When once evidence had been thus manufactured—when once such evidence had succeeded in convincing the court—the temptation to have recourse again to this expedient

[1] Chronicon Rameseiensis (R.S.) 65, "donaria . . . universa fere Anglice scripta invenimus, inventa in Latinum idioma transferri curavimus;" cf. ibid 111, 112, 151, 161, 176, cited Earle cviii.

[2] For a very good illustration see Mr. Davis's account of the charter of Battle Abbey, E.H.R. xxix 431-433.

[3] Op. cit. pp. 90, 92.

[4] Below 155-156.

[5] Vol. i 88-89.

[6] Vol. i 88 n. 5.

must have been considerable. We shall see that in the thirteenth and fourteenth centuries many of the larger monasteries and ecclesiastical corporations began to make catalogues of their possessions.[1] If a scribe with literary tastes and legal knowledge were making such a catalogue, and a flaw appeared in the title, the correction of such flaw before any legal question arose must have seemed an obvious expedient. As Earle puts it, "it was a restoration of lost evidence to support a real and existing right."[2]

Nothing perhaps in the whole history of English law illustrates so well the essential continuity of the English legal system as these land charters—whether original or forged. The title to land or franchise in the fourteenth century might, and often did, depend upon some charter of the eighth or ninth century; and there is no doubt that some of the lands held at the present day by ecclesiastical corporations "are in fact ancient bookland, which has been held without a break in title since it was first granted by some West Saxon or Mercian king with the witness and consent of his Witan."[3] Abroad, the age of the Capitularies, the age of the charters and grants of immunity, is sharply severed from the feudal law of the thirteenth, fourteenth, and fifteenth centuries. There is no such severance in England. The change in legal language at the Norman Conquest, and the simplifications effected by royal justice, often conceal the extent to which some of the principles of Anglo-Saxon law have been built into the fabric of the common law. This series of Land Charters is a unique record of its continuity, for they furnished a good root of title to many of the largest estates in mediæval England.

Contemporary Codes of Law and Literary Works.

Such are the direct sources of Anglo-Saxon law. As I have said, they require to be supplemented by some knowledge of the unenacted custom which constituted, so to speak, their legal environment.

The earlier period of Anglo-Saxon history is illustrated by writers like Cæsar, and more especially Tacitus, who describe our Saxon ancestors before they came to England.[4] We must supplement their account from those continental codes known as the *Leges Barbarorum*, which preserve tribal ideas and customs common to the race. Of these codes, that of the Salian Franks is perhaps the most important. Perhaps, too, by virtue of the Norman Conquest, we may claim the Salic law as one of the

[1] Below 369-370. [2] Earle 321.
[3] Pollock, Land Laws 35, citing Archæologia xlvi 371.
[4] See the most important extracts in Stubbs, Sel. Ch.

lineal ancestors of English law. There are no less than eight texts of the Salic law. The oldest is a short text of sixty-five titles called "Pactus legis Salicæ," probably compiled under Clovis (486-496). Later texts add other titles. In the Carlovingian period a recension was known which is called the Lex Salica Emendata. This Salic law represents a very primitive form of Germanic custom. It consists mainly of a tariff of penalties and a short sketch of the procedure to be employed. Other branches of law are dealt with in seven titles only. Such matters would doubtless be dealt with by well-known custom. Criminal law and procedure it would be the most important to state, because these matters might affect others who did not live under the Salic law.[1] Among the other codes we may mention the laws of the Ripuarian Franks[2]—a younger offshoot, and in some respects a copy of the Salic law, the lex Saxonia, the lex Anglorum, the lex Alamannorum, and the lex Bavariorum.[3]

I have said that English law probably owes little to Celtic influences. The collections, therefore, of Welsh and Irish custom which have come down to us have little direct bearing upon the origins of English law.[4] It is possible, however, that they may, by way of analogy, help us to understand some of those primitive tribal customs such as the blood feud and the wergild which we see in a later form in the Anglo-Saxon codes. As Maine has pointed out, the Brehon laws of Ireland illustrate, under other conditions, some of the reasons for the growth of that dependency of the poorer men upon the more wealthy which is one of the bases of feudalism.[5]

More directly instructive are the collections of Scandinavian customs and certain literary works of the northern nations. They help us to understand more especially the law prevailing in the northern parts of England, where the Danish influence was the strongest. The two most important of these laws are the Gula-thing, which was in force in the southern part of

[1] Esmein, Histoire du droit Français 108-112; L.Q.R. xiv 18. The best edition, containing all the eight texts, is by Kessels and Hern.

[2] Esmein, op. cit. 112-114.

[3] For these laws see Stubbs, C.H. i 52-54; Seebohm, Tribal Custom in Anglo-Saxon Law, 213; L.Q.R. xiv 22, 23.

[4] The ancient laws of Wales are contained in three codes. For N. Wales there is the Venedotian code; for S. Wales there are the Dimetian and Gwentian codes. They are supposed to originate from Howel, who codified the customary law in the tenth century. They all contain additions later than this. Except one MS., which dates from the early thirteenth century, the MSS. date from the late thirteenth century, Seebohm, Village Community 189, 190. For the Irish or Brehon laws see Maine, Early Institutions, Lecture 1. They consist of various tracts. The two largest are the Senchus Mor and Book of Aicill—the first probably of the eleventh, the second of the tenth century. They consist of a text accompanied by glosses and explanatory paragraphs.

[5] Vol. i 22 n. 3.

Norway, and the Frosta-thing, which was in force in the more northerly division of Dronheim. Though they date from the eleventh century, they present a more instructive picture of tribal society and ideas than many codes earlier in date. They are less influenced by the ideas drawn from Roman and ecclesiastical law, which, even in the sixth and seventh centuries, were reshaping the old tribal ideas of the nations settled in less remote parts of Europe.[1] Perhaps of more value even than these analogous codes of law are the literary works of the northern nations. They illustrate the working of the law, and they reproduce in a measure the atmosphere within which the law worked. Among these we may notice the poem of Beowulf. It is "an Anglian or Northumbrian recension of a story founded upon Scandinavian tradition, and designed for use or recited at some eighth-century royal court—possibly, if Earle's suggestion be correct, that of King Offa."[2] The scene is laid chiefly in the Baltic. It affords valuable evidence as to the rights and liabilities of the kindred in relation to blood feud and wergild. It is assumed by the relator of the story that all these rules will be known to the Anglo-Saxons. Another literary source of a similar nature are the Icelandic sagas. All these sagas were reduced to writing between 1000 and 1200, after the conversion of the northern peoples to Christianity. The Njal Saga, or the story of Burnt Njal, as it is sometimes called, is the most famous of them.[3] It pictures for us a purely Teutonic community absolutely unaffected by Roman and ecclesiastical ideas. Like the story of Beowulf, it gives us valuable information as to the rules of blood feud and wergild. Most valuable is its information as to primitive legal procedure. We can see on the one side that verbal and literal adhesion to the forms of procedure are needed to begin a suit; and that, when the suit is begun, the same accuracy is required in the statement of the case. A slip in form is fatal to the strongest case. The judges, to use Maitland's apt simile, are in the position of "the umpire of our English games who is there . . . merely to see that the rules of the game are observed." They "sit in court, not in order that they may discover the truth, but in order that they may answer the question 'How's that.'"[4] On the other side we can see that the law court is but a recent innovation on the method of deciding disputes by armed force. The parties summon their friends to help them, and attend the court with hostile armies. At any

[1] Seebohm, Tribal Custom in Anglo-Saxon Law 238, 239.
[2] See ibid chap. iii for an account of the poem.
[3] See the English translation and introduction of G. W. Dasent.
[4] P. and M. ii 667.

point the duel may be demanded; and if the subtlety of the pleader may prove fatal to a righteous claim, the pleader himself may at any moment be challenged to the duel by the impatient antagonist, or the court may be broken up and war begun. At the same time we can see that all this is compatible with a certain measure of civilization—with trading, with marriage settlements, with leases, with the ordinary pursuits of agriculture. And, if the law is of little avail when passions are thoroughly aroused, it does provide a rule for the peaceful settlement of disputes in ordinary cases, it does provide a standard of right, conformity to which public opinion demands. In the scarcity of evidence as to the daily ordinary life of our Anglo-Saxon ancestors, such an authority as this is valuable, because it corrects the impression which we may get by studying the law alone. A too exclusive study of law may at all periods lead us to an unduly low estimate of the condition of the society for which the law is made; and this is specially true in the case of rude peoples whose laws deal mainly with offences of fraud or of violence.

The later period of Anglo-Saxon law is illustrated by documents of the Anglo-Norman period—William I. to Henry I. We shall see that the Norman Conquest led to many attempted reconstructions of Anglo-Saxon law.[1] The most important authority—perhaps the most important of all authorities for the later Saxon period—is the Domesday survey of the Conqueror. With the survey itself I shall deal in the following Book.[2] Here it will be sufficient to say that it describes the condition of the country on the day when Edward the Confessor "was alive and dead," and so gives a unique picture of the social and political condition of the country at the close of the period. If it could be thoroughly understood and interpreted it would throw a flood of light upon the provisions of the Anglo-Saxon codes, because it supplies the information which they assume.

Such, then, are the authorities for Anglo-Saxon law. We must now turn to the more important branches of the law itself.

[1] Below 151-154.

[2] Below 155-165.

PART II

THE RULES OF LAW

THE chief branches of law in this period will be discussed in the following order: § 1. The Ranks of the People; § 2. Criminal Law; § 3. The Law of Property; § 4. Family Law; § 5. Self Help; § 6. Procedure.

We shall see that all these branches of law illustrate the gradual development of feudal conditions from the more primitive period when society was organized largely on the basis of kindred. Traces of this primitive period appear most clearly in the first two branches of the law. The law of property illustrates most clearly the growth of feudal conditions. In family law we can trace many ecclesiastical influences. In the law of procedure we can see a development which will pave the way for a more ready acceptance of newer and more rational principles in the following period.

§ 1. The Ranks of the People

Under this head I shall endeavour to give some account of the manner in which the Anglo-Saxons were grouped when they first came to England, and of the modifications in that grouping which were introduced during the six hundred years before the Norman Conquest. It will be necessary to say something of certain tribal ideas, taken from a time when society was mainly founded on the tie of kindred, because these ideas are tacitly assumed to exist in all the Anglo-Saxon laws.[1] They are the basis of the earlier laws; and even in the latest codes of Anglo-Saxon custom, drawn up after the Norman Conquest, they still appear. I must then show how these ideas were subsequently modified by the growth of an organized state, by the growth of feudal conditions, and by the introduction of Christianity.

[1] "There can be little doubt that in the solidarity of the kindred under tribal custom we have to do with the strongest instinct which everywhere moulded tribal society. So far as it had its way and was not confronted by more potent forces it must have almost necessarily ruled such matters as the division of classes, the occupation of land, and the modes of settlement," Seebohm, Tribal Custom in Anglo-Saxon Law 499; Vinogradoff, Manor 136.

The Anglo-Saxons, in common with the other Germanic peoples, based their primitive organization upon the tie of kindred. The kindred of a person is known as the "maegth."[1] It was a man's kindred who avenged him if he were slain, and to whom the wergild was payable. Conversely it was the kin of the murderer who must help to bear the feud or pay the wergild. Both paternal and maternal relatives shared these rights and duties, generally in the proportion of two-thirds and one-third respectively.[2] On the other hand, husband and wife remained in their own maegth. "There being no blood relationship between husband and wife, the husband's kindred alone were liable for his crimes, and the wife's alone for her crimes, and neither the husband nor the wife received any portion of the other's wergild or was liable for his or her homicides."[3] Upon the question how far the maegth was a permanently organized group opinions differ. On the one hand, its constituents obviously varied with the individual. The persons who might be called upon to avenge the death of a father would not be quite the same as those who could be called upon to avenge the death of his son. On the other hand, it was a "recognized association for social purposes of all kinds, and not an indefinite number of relatives, like our modern Smiths and Browns."[4] To some extent it had a "common aim and will." As we shall see,[5] even to speak of these communistic groups of primitive times in the precise terms of modern law tends to mislead. Much more does it tend to mislead if with the help of these terms we try to analyse them. Probably the tie of kindred and the rights and duties involved therein were indissoluble.[6] A passage in the laws of Henry I. seems to say that the tie could be dissolved;[7] but it is a copy of a passage in the Salic law, and it is not clear, in the absence of other evidence, how far it is applicable to Anglo-Saxon law.

It is probable that the ranks of the people were in the earliest time based upon this primitive organization. The man who has a large number of kindred is the man entitled to the highest rank. The descendants of others—strangers or manumitted slaves—do not attain to the highest rank till they have attained the full number of kindred. Thus in the Norse laws the highest

[1] Essays in Anglo-Saxon Law 122, 123. [2] Below 45.
[3] Seebohm, Tribal Custom in Anglo-Saxon Law 498.
[4] Vinogradoff, Manor 137, 139. [5] Below 401-402.
[6] Essays in Anglo-Saxon Law 140, 141; Vinogradoff, Manor 139.
[7] Leg. Henr. 88. 13, "Si quis propter faidiam vel causam aliquam de parentela se vellit tollere, et eam forisjuraverit, et de societate, et hereditate et tota illius se ratione separet; si postea aliquis de parentibus suis abjuratis moriatur vel occidatur, nihil ad eum de hereditate vel compositione pertineat; si autem ipse moriatur vel occidatur, hereditas vel compositio filiis suis vel dominis juste proveniat;" Essays in Anglo-Saxon Law 140.

rank is the "odaller," who inherits land from his grandfather's grandfather, i.e. he must go back four degrees.[1] On the other hand, a "leysing," or manumitted slave, though free, was still under obligations to his former owner. It was not till the ninth generation that his descendants lost all connection with his former master; but, with the growth of a kindred, they gradually rose in social rank and got a higher wergild.[2] In the earliest Anglo-Saxon laws we see a clear division of free men into two classes, Twelfhynde and Twyhynde[3]—gesithcund and ceorl;[4] and in the treaty made between Alfred and Guthrum these two classes were, in respect of wergild, put on a level with the Norse odal and leysing.[5] It is therefore probable that some of these tribal conceptions are at the back of these divisions. Perhaps in the three classes of læts mentioned in Æthelbert's laws[6] we may see the gradual rise in social status of the manumitted slave. It is clear that in the northern parts of England either the growth of a kindred or the possession of land was a condition precedent to higher rank; and that for hereditary rank the growth of a kindred was essential.[7] Just as in the continental laws, so under Anglo-Saxon law, the strangers in blood were only paid for by a half wergild.[8]

When the state became more organized these primitive principles gave place to others; but, as I have said, they were

[1] Seebohm, Tribal Custom in Anglo-Saxon Law 271. [2] Ibid 263-270.

[3] Ibid 406-416; Chadwick, Studies 87-99.

[4] Seebohm 435, 436; Chadwick 77-99. These two distinctions may not be identical. Seebohm considers that the first must be referred to the tribal idea of kindred, the second to the fact that the gesith is specially related to the king. But as the gesith became a landed proprietor while the lower class of ceorls became their tenants the two distinctions tended to merge. "We may easily believe that the gulf between classes resulting from tribal instincts and confirmed by difference in wergilds was hardened and widened by conditions of landholding in the conquered country, which tended to raise the one class more and more into manorial lords and depress the other into more or less servile tenants;" but cp. Chadwick, op. cit. 95, 325-327.

[5] Thorpe i 153, 155; Seebohm, op. cit. 353-355; Vinogradoff, Manor 125, 126, 131-133.

[6] Æthelbert § 26; Chadwick, op. cit. 112-114. These læts seem to be peculiar to Kent.

[7] "And if a ceorlish man thrive, so that he have five hides of land for the king's utware, and any one slay him, let him be paid for with two thousand thrymsas. And though he thrive, so that he have a helm and coat of mail, and a sword ornamented with gold, if he have not that land, he is nevertheless a ceorl. And if his son and his son's son so thrive that they have so much land; afterwards the offspring shall be of gesithcund race at two thousand [thrymsas]," Wergilds, Thorpe i 189 §§ 9-11.

[8] Ordinance of the Dunsetas, Thorpe i 353 § 5, "If a Wealh slay an Englishman, he need not pay for him on this side except with half his wer; no more than an Englishman for a Wealh on that side; be he thane born, be he ceorl born: one half of the wer in that case falls away." This explains the stipulation in Alfred's treaty with the Danes that Danes and English shall be "equally dear," Thorpe i 153, 155. Perhaps the six hynde class of Alfred's and Ine's laws may be explained in this way, Ine § 24; Seebohm, op. cit. 396-404; but cp. Chadwick, op. cit. 92, 93.

never wholly eradicated. On the contrary, the state sometimes recognized and regulated them. Thus, as we shall see, it regulated the occasions upon which recourse might be had to the feud.[1] It regulated the amount of the wergild.[2] It required a man who had no kin to find himself a lord.[3] It was the kindred who must support a litigant before the courts.[4] In some cases a man forfeited his right to the support of his kindred.[5] As the state gained in strength it suppressed the maegth if it attempted to stand against the law;[6] and it invented other means to secure the preservation of the peace, as we can see from the police legislation of Edgar.[7] But the old ideas lived on. Even in the Laws of Henry I. the liability and right of the kindred in case of homicide were recognized, and in the same proportions as under the old law.[8]

But at the end of the Saxon period, though we may still see traces of the old ideas, society is no longer organized on this basis. The two principles which supplant the old ideas are the principles of wealth and official employment in the service of the king. As the state becomes feudalized these two principles shade off into one another. The wealthy man will, almost of necessity, have some share of political power. We can see from the North People's law that a man's position in society is dependent partly upon wealth, partly upon birth.[9] We can see from the laws of Ine that the gesith, or royal servant, has by virtue of his official position a higher wergild—holds a higher position in society than the ordinary ceorl.[10] If in addition he owns land his wergild is higher still.[11] The earldorman of the shire may originally have been in some cases a man of noble blood.[12] He came, as we have seen, to hold his rank as the chief official of the shire; and, in the latter part of the Anglo-Saxon period, as the ruler of a province[13] The bishops and archbishops also held their rank by virtue of their official position. The

[1] Below 44-45. [2] Below 45. [3] Athelstan i §§ 2 and 8.

[4] Northumbrian Priest Law § 51; Athelstan i §§ 6, 11.

[5] Alfred § 42; Leg. Henr. 88. 15; Edmund ii (Secular) § 1 attempted to break up the solidarity of the kindred by making the man guilty of homicide bear the feud alone; but this attempt did not succeed, Ethelred ix § 23; Cnut (Ecclesiastical) § 5.

[6] Athelstan (Judicia Civitatis Londoniæ) 8. 2, "And if it should happen that any kin be so strong and so great . . . whether xii-hynde or twyhynde that they refuse us our right and stand up in defence of a thief; that we all of us ride thereto with the reeve within whose manung it may be." Later the state tried to make the duties owed to it override the duties to the kindred, Edgar ii § 7; Cnut (Secular) § 25.

[7] Ordinance of the Hundred, Thorpe i 259-261. [8] Leg. Henr. 76.

[9] Above 37. [10] Chadwick, op. cit. 309, 310.

[11] Ine § 51, "If a gesithcund man *owning land* neglect the fryd let him pay cxx shillings and forfeit his land; one not owning land lx shillings;" Seebohm, op. cit. 418, and above 37 n. 4.

[12] Stubbs, C.H. i 186-188; Chadwick, op. cit. 111, 162, 289-290, 306-307, 350.

[13] Vol. i 6.

thane held his rank sometimes by virtue of his official position, sometimes because he owned five hides of land, sometimes by virtue of his position in the church, sometimes because he was a successful trader.[1] In fact, the term "thegn" became the *nomen generale* for the higher classes of society,[2] and among them were many different degrees.[3] In the "Rectitudines Singularum Personarum"[4] the condition of the thegn is first described; and beneath this class are ranged dependent people, who might or might not be free—the cottar, the gebur, the cowherd, the shepherd, the goatherd. They hold their plots of land by performing services on the land of the more exalted classes.[5]

Thus although for certain purposes the old ideas lived on, they ceased to regulate the position of the various classes in society. They survived chiefly in the laws regulating the payment of the wergild, and in the rule that for this purpose there was no relationship between husband and wife. Even in these branches of the law we shall see that under the influence of the church they were beginning to look obsolete.[6] Society is coming to be organized on a feudal model. The position of classes in society, the distribution of political power, is coming to be regulated by the possession of land. The eorl and the earldorman were no doubt primarily officials. But it is possible that their official position carried with it definite landed estates.[7] It may be that the term eorl sometimes signified rank; sometimes perhaps an estate of forty hides.[8] The independent landowner, whether a medial or a king's thegn, must hold at least five hides of land. Below them come the miscellaneous class who either hold their land of a lord by various agricultural services,[9] or who

[1] Ranks, Thorpe i 191-193.

[2] Stubbs, C.H. i 183-185, "Under the name of thegn are included various grades of dignity. . . . We may well believe that the combinations and permutations of nobility by blood, office, and service would create considerable differences among men bearing the common title. The alodial eorl who for security has commended himself to the king and bears an honorary office at court, the official earldorman who owes his place to royal favour earned in the humbler status of a dependent, the mere courtier who occupies the place of the ancient gesith, the ceorl who has thriven to thegn right, the landowner of five hides or more, and the smaller landowner who has his own place in the shire moot, all stand on different steps of dignity;" as to the origin of the five hides cp. Chadwick, op. cit. 102.

[3] Cnut § 72.

[4] Thorpe i 430-441.

[5] For more details as to these persons see Ballard, The Domesday Inquest 111; Chadwick, op. cit. 85-87; Vinogradoff, Manor 232-235; in the "geneat" described in the Rectitudines Professor Vinogradoff sees the class of manorial officers (vol. iii 47-48) of later days, English Society 72.

[6] Below 53-54.

[7] Domesday Book and Beyond 168.

[8] As to the evidence for this see Stubbs, C.H. i 184, n. 1.

[9] Rectitudines Singularum Personarum, Thorpe i 441, "Leges et consuetudines terrarum sunt multiplices et varie;" for this document see Vinogradoff, Manor 231, 232; above 21.

own their land freely, but have for some reason commended themselves to a lord,[1] or who fill various offices in the manorial communities which were springing up on all sides at the end of this period.[2] It was an intricate system—"a system rendered the more intricate by poverty of nomenclature, variety of provincial custom, and multiplicity of ranks, tenures, and offices."[3] We have not yet attained to the clear classification of later law. Society is not yet organized entirely by reference to landowning. But we can see that it is a man's position in relation to the land which is tending to become the most important element in fixing his position in society. In this, as in other branches of the law, the Norman lawyers effected simplifications and generalizations. But we can see in hazy outline, at the end of the Anglo-Saxon period, the materials which will supply the basis of their simplified classification. A society composed of the greater barons, the lesser barons, the freeholders, the wide class of villani, may be created by emphasizing certain tendencies at work in Anglo-Saxon society, by simplifying and generalizing certain rules of Anglo-Saxon law.

I have been dealing with the various classes of free men. I must now say something of the theow or slave.

All the Germanic peoples recognize slavery.[4] But, according to Tacitus, it was a slavery of a kind different to that to which the Romans were accustomed. The slaves had their own religion and dwelling-place, and they were bound to perform only certain and fixed duties for their owners.[5] They were rather prædial serfs than slaves like those known to the Roman law. Such slavery might arise from many different causes. Capture in war,[6] and conviction for crime, were clearly recognized sources of slavery in Anglo-Saxon law.[7] In times of disturbance or famine men would sell themselves into slavery,[8] and the right of the father to sell his children was recognized.[9] In addition to this, poor or friendless persons were often kidnapped and sold

[1] Vol. i 21, 22.

[2] Vol. i 23, 24, 28, 29; Vinogradoff, Manor 227, 228; English Society 212.

[3] Stubbs, C.H. i 189.

[4] Kemble, Saxons i chap. viii.

[5] Germania, c. xxv, "Cæteris servis, non in nostrum morem, descriptis per familiam ministeriis utuntur. Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono, injungit; et servus hactenus paret."

[6] Kemble, Saxons i 186, 187.

[7] Edward § 9; Edward and Guthrum § 7; Ethelred vi § 9; Kemble, C.D. no. 601.

[8] Kemble, C.D. no. 925; Kemble, Saxons i 196, 197; Pœnitentialis Theodori, Thorpe ii 19, "homo xiii annorum sese potest servum facere."

[9] Kemble, Saxons 199, 200; Thorpe ii 19. In the Penitential of Egbert there are contradictory passages on this subject, see Kemble, Saxons 200 n. 2.

into slavery. The Anglo-Saxon laws[1] and the Pœnitential books[2] contain many provisions against this practice; but they were not very effectual. In William I.'s reign an extensive slave trade was still carried on at Bristol, which was only temporarily stopped by the energetic preaching of Bishop Wulfstan.[3]

The slave was in some respects regarded as a chattel. He might be sold or otherwise alienated by his master. He could be ill-treated, perhaps even slain. He could bring no action against a free man. His lord got the damages if he was slain by another, and must pay for his misdeeds, and he himself must be corporally punished. Having no relatives he must defend himself by the ordeal if accused of crime.[4] But in a Christian state it was impossible to regard the slave as a chattel and nothing more. The church secured to the slave certain holidays, and if the master compelled the slave to work on these days he became free.[5] It would appear that one slave might be able to sue another slave.[6] The church punished by penance masters and mistresses who murdered their slaves.[7] The allowances of food were regulated, sometimes with great detail.[8] "It seems doubtful," says Kemble, "whether the labour of the serf was practically more severe, or the remuneration much less, than that of an agricultural labourer in this country at this day."[9] It was probably due also to the influence of the church that the slave was enabled to acquire property with which he could purchase his liberty, or save his skin if convicted of wrongdoing.[10] The church also by example and by precept encouraged manumissions,[11] and we thus get a class of freedmen—*coliberti* or *leysings*.[12] "He who wishes to manumit his slave," say the laws of William I., "let him deliver him by his right hand to the sheriff in the full county court, and he ought to proclaim him

[1] Ine § 11; Ethelred v § 2; vi § 9; Cnut (Secular) § 3.

[2] Pœnitentialis Theodori xlii §§ 4 and 5; Thorpe ii 50; these books were, as Brissaud says, "des manuels de confesseurs énumérant article par article la pénitence afférente à chaque péché;" but in the course of the ninth and tenth centuries, "les penitences publiques en usage dans la primitive Eglise tombèrent en désuétude; on leur substitua des pénitence privées," Histoire du droit Français i 135; they shed valuable side-lights on different branches of law, more especially on criminal law, below 53.

[3] Freeman, Norman Conquest iv 386.

[4] Kemble, Saxons i 209-211; Stubbs, C.H. i 89.

[5] Ine § 3; Alfred § 43; Ethelred viii § 2; Cnut (Secular) § 45.

[6] Wihtræd § 24. [7] Pœnitentialis Theodori, xxi §§ 12, 13; Thorpe ii 23, 24.

[8] Rectitudines, Thorpe i 432. [9] Saxons i 214. Kemble was writing in 1848.

[10] H. and S. iii 402, "Non licet homini a servo tollere pecuniam quam ipse labore suo adquesierit;" Wihtræd §§ 9, 13; Kemble, Saxons i 213 and references there cited; ibid App. C.

[11] Kemble, Saxons i App. C., where the precedents of the manumissions of slaves are collected.

[12] Vinogradoff, English Society 468, 469.

quit of the yoke of his slavery through manumission, and let him show his former slave the doors and the ways open before him, and let him deliver to him the arms of a free man, the lance and sword."[1] The laws of other Germanic peoples contained very similar provisions.[2] The church encouraged manumissions by will, and the charters show that slaves were bought and manumitted at the door of the church.[3] Sometimes in these cases the only record of the transaction would be a memorandum in the book of the Gospels.[4] It is probably to the influence of the church that we must ascribe the repeated legislation against the practice of selling Christian men and women out of the country—legislation which, as I have said, was not very efficient.

Slavery with the Anglo-Saxons was therefore modified not only by its prædial character, but also by the influence of the church. It is probable that at the end of this period the class of prædial serfs comprised most of the humble cultivators of the soil. The gebur, the ploughman, the cottar, and their progeny were often serfs attached to the soil, and sold with the soil. They were the most valuable part of the stock of a farm, and their pedigrees were carefully preserved.[5] Whether they were personally free or not would probably make little material difference in an age in which there was no free market either in labour or land. The slave class was tending to become merged in the miscellaneous class of persons who actually cultivated the soil. This class was composed of slaves by birth, slaves degraded by crime, men who "in evil days had bowed their heads for bread." In all cases their rights and their duties were ascertained, not by any general law of free man and slave, but by the custom of the particular estate which required them to fulfil certain obligations to a particular lord. For some purposes indeed—chiefly in connection with the law as to wrongs—the distinction between free and slave was clearly drawn in the law books.[6] But for many purposes the distinction was not very apparent. In Domesday Book "the *servus* who has land and oxen may be casually called a *villanus*, and we cannot be sure that no one whom our record calls a *servus* has the wergild of a free man."[7] The laws of Cnut seem to show that it was easy to confuse the slave and the small free man.[8] As with other branches of the law so here, the duties and the rights of the servile class were tied down to a certain estate; and so the way is being prepared for the creation, in the

[1] Laws of William I. iii § 15; Leg. Henr. 78. 1. [2] Kemble, Saxons i 221.
[3] Kemble, C.D. nos. 716, 721, 931, 981, cited Saxons i App. C. [4] Ibid.
[5] Kemble, Saxons i. 225-227. [6] Domesday Book and Beyond 30-33.
[7] Ibid 34; Vinogradoff, English Society 217, 218, 418.
[8] Cnut (Secular) § 20.

following period, of the wide class of villani.[1] We shall see that the lawyers of later days will sometimes attempt to apply to them the Roman law of slavery, and ideas and rules based on personal servitude will live long beside ideas and rules based on prædial serfdom. But the clear conceptions of the Roman law could not be applied to an agricultural community organized on a feudal basis. Still less could they be applied to a community in which the royal power will for many purposes regard the serf as its subject, under the same laws, and liable to perform duties similar to those of the free man.

§ 2. Criminal Law

I shall deal firstly with the substantive law, and secondly with the principles of liability.

The Substantive Law

We cannot use the term criminal law in a technical sense in the Anglo-Saxon period. A primitive system of law has no technical terms. It has rules more or less vague, and terms corresponding thereto, which will, if the law has a continuous history, become the technical rules, and give rise to the technical terms of later days. In this period we have not yet arrived at the distinction between the law of crime and the law of tort; far less have we arrived at the leading distinctions of the later criminal law—felony, treason, and misdemeanour. Even when we have attained to these technical distinctions the criminal law will retain some traces of its origin in a very primitive society, and many traces of the processes by which these distinctions have been evolved.

Physical force is the natural method of redressing wrongs, and, when men are grouped in small families or communities, this leads naturally to the blood feud.[2] A step forward is made when recourse to a court appears as an alternative to physical force. But recourse to a court is an innovation disliked and with difficulty followed—regarded, in fact, much as some of us regard the submission of international disputes to arbitration. The court has little coercive authority. Primitive man is like the civilized state. He does not see that the court has any right to exercise authority unless he has agreed to submit to its decisions.[3]

We see many survivals of these ideas in the Anglo-Saxon codes. One of the laws of Alfred regulates the conditions under

[1] Below 264 265; vol. iii. 491 seqq.; cp. Vinogradoff, English Society 465-468.
[2] P. and M. ii 448, 449; Essays in Anglo-Saxon Law 263, 264.
[3] Sohm, Procedure of the Salic Law (tr. Thévenin) 105, 106, 115-119.

which the feud may be prosecuted.[1] One of the laws of Edmund regulates the manner in which the Witan shall appease the feud.[2] The laws of Cnut show that the feud was still prosecuted.[3] Some codes of tribal custom show that the obligation to prosecute the feud might be so burdensome that it might be better to withdraw from one's kin.[4]

As soon as society begins to become more settled some method must be found of stopping the interminable feuds to which an unrestrained recourse to physical force obviously leads. The Anglo-Saxon codes contain rules which define the occasions upon which physical force may be used. If a man be slain the slayer must show that his victim was attacking his kin or his lord, or that he was wronging his wife, mother, sister, or daughter,[5] or that he was in the act of carrying off stolen property,[6] or that he was resisting capture.[7] At the latter part of this period even the plea of self-defence is hardly allowed.[8] If a wrongdoer is not caught in the act he must be brought before a court. The laws of Ine impose a penalty if revenge is taken before justice is demanded.[9]

The most obvious method of putting a stop to the feud is to persuade the injured man or the relatives of the deceased to accept some pecuniary compensation. Just as in Roman law,[10] this compensation was at first voluntary.[11] If the injured man did not choose to accept the compensation (*bot*), if the relatives of the deceased did not choose to accept the *wer* of their slain relative,

[1] Alfred § 42, "That the man who knows his foe to be homesitting fight not before he demand justice of him. If he have such power that he can beset his foe, and besiege him within, let him keep him within for vii days, and attack him not if he will remain within. And then, after vii days, if he will surrender, and deliver up his weapons, let him be kept safe for xxx days, and let notice of him be given to his kinsmen and his friends. . . . In like manner also, if a man come upon his foe, and he did not know him before to be homestaying, if he be willing to deliver up his weapons, let him be kept for xxx days, and let notice of him be given to his friends; if he will not deliver up his weapons, then he may attack him."

[2] Edmund (Secular) c. 7; ibid. c. 1 there is an attempt to prevent a man's friends from joining in the feud.

[3] Cnut (Ecclesiastical) 5.

[4] Salic Law lx; Seebohm, Tribal Custom in Anglo-Saxon Law 134; for the passage in the Leg. Henr. 88. 13 which seems to lay down the same rule for England, see above 36 n. 7.

[5] Alfred § 42, "We also declare that with his lord a man may fight 'orwige' (i.e. without penalty) if any one attack the lord; thus may the lord fight for his man. After the same wise a man may fight with his born kinsman, if a man attack him wrongfully, except against his lord. . . . And a man may fight 'orwige,' if he find another with his lawful wife within closed doors . . . or with his daughter, sister, or mother;" Leg. Henr. 82. 7-9.

[6] Athelstan i 1; Leg. Henr. 57. 4. [7] Ine 12, 21, 35. [8] Below 51.

[9] Ine 9, 35, 73; Leg. Henr. 57. 4, "Si cum aliquo inventum sit unde culpatus sit, ibi necesse est causam tractari, et ibi purgetur vel ibi sordidetur."

[10] Gaius Instit. iii 189; Just. Instit. iv 4, 7; Girard, Droit Romain 396.

[11] Æthelbert c. 65.

the feud would be pursued. The wer is at first simply an alternative to the feud. But when we first get evidence as to Anglo-Saxon law this stage has passed.[1] Pecuniary compensation is, as a rule, obligatory. The laws of Æthelbert[2] are almost entirely taken up by a tariff of compensations payable for various offences. The tariff for injuries is very minute; and it varies in all cases with the rank of the injured person.[3] At the latter part of the Anglo-Saxon period we meet with two other payments to which an injury might give rise. The *fightwite* was due to a lord possessing soc over a place where a wrong was done.[4] The *man bote* was the payment due to a lord whose man had been slain.[5] It is clear that these are later developments due to the growth of dependency and of private jurisdiction.

Throughout the Anglo-Saxon laws we meet with these tariffs.[6] The bot and the wer dominate the code. We cannot understand either the amount of the wergild or the method of its payment unless we remember that it took the place of the feud, and that the feud was always in the background to be resorted to if the money was not paid. "Buy off the spear or bear it," ran the English proverb. Just as the kindred, paternal and maternal, would have been liable to prosecute the feud, so they paid or shared the wergild in the proportion generally of two-thirds and one-third respectively. Its payment and receipt was in the nature of a treaty between opposing clans.[7] The laws of Henry I. contain the significant advice that in paying the wergild it is better to make peace with all the relatives together than with each singly.[8] We have seen that in some of the continental codes liability to prosecute the feud might occasion a withdrawal from the

[1] A passage from the Frosta-thing laws of Scandinavia, cited Seebohm, Tribal Custom, etc., illustrates well these two periods, "Here begins and is told that which to most is dark, and yet many had need to know . . . how to divide the fixed bots if they are adjudged, for it is now more the custom to fix the bots, how many marks of gold shall be paid on account of him who was slain, and the cause of that is that many know not what the lawful bot is, and though they know it few will now abide by it. But the Frostra-thing book divides the lawful bots according to his birth and rank, and not those bots which they that sit in courts and make terms of peace put too high or too low;" for a survival of these old ideas see Tait, Mediæval Manchester 86, 87.

[2] §§ 3-90.

[3] Leg. Henr. 76, "Si homo occidatur sicut natus erit persolvatur."

[4] Ed. Conf. c. xii; Leg. Henr. 80. 6.

[5] Ibid 70; Chadwick, op. cit. 123-124.

[6] Alfred c. 47 seqq.; Wergilds, Thorpe i 187-191; Leg. Henr. 92-94.

[7] Seebohm, Tribal Custom, etc. 17, 43 (Welsh), 77 (Irish); Leg. Henr. 76. 6; below .

[8] Leg. Henr. 88. 17, "Et in omni weregildo melius est ut parentes homicide pacem simul faciant quam singillatim." For more detailed rules see ibid 76. 1 and 5; Ed. Conf. c. xii; see Dasent, Burnt Njal 1 clxviii, clxx, for the formula of the Icelandic reconciliation. For a late instance of such a composition of the year 1208 see Select Pleas of the Crown (S.S.) no. 102.

kindred.[1] The liability to pay the wer might produce the same result.[2] Just as there could be no feud within the kindred so no wer was payable if one kinsman slew another.[3]

If the compensation were not paid, the injured man or his kin might in former days have prosecuted the feud. In later days the defaulter was outside the law, and as a wild beast could be pursued and slain.[4] The decree of outlawry remained for many centuries the ultimate remedy of the state. But we shall see that with the growth of a more ordered society decrees of outlawry ceased to be so freely issued.[5] Many steps must intervene before this final step is taken. To withdraw the state's protection from the individual and to declare war against him is the only course open to a rude society, and in the infancy of the state it is not necessarily efficacious. The increasing organization of the state gives it other means of constraint, and renders this course so efficacious that, in fairness to the individual, it is only used when all other means have failed.

It is this system of bot and wer, resting upon the blood feud and upon outlawry, which is the groundwork of the Anglo-Saxon criminal law. In Domesday Book and in the laws of Henry I. we see it as distinctly as in the dooms of Æthelbert.[6] But though these ideas are the groundwork, they are not the whole of the Anglo-Saxon criminal law. We find there traces of ideas still more archaic. We find also more civilized ideas which, at the end of the period, are obtaining a greater definiteness and importance.

The older ideas.

Occasionally we see in survivals traces of the idea that the tribe must wipe out all memory of an offence by destroying not only the criminal, but also his property.[7] We see, too, in some of the Anglo-Saxon laws traces of an allied idea—the idea of the noxal surrender.[8] The guilty thing must be given up; and it is only if the owner declines to give it up that he can be made liable. The idea that guilt attaches to the thing by which wrong has

[1] Above 36, 44. [2] Lex Salica lviii; Seebohm, Tribal Custom, etc., 140-147.

[3] Ibid 63 (Beowulf), 176 (Alamannic laws), 242 (Scandinavian law); Leg. Henr. 75. 5, "Qui aliquem de parentibus suis occidit, dignis apud Deum pœnitentiæ fructibus emendet."

[4] Athelstan i 2; Ethelred i 4; Essays in Anglo-Saxon Law 271. Cp. the Salic Law lviii.

[5] P. and M. ii 448; vol. iii 604-606. [6] Ibid ii 454-456; D.B. i 262 b.

[7] For "house destruction" as a penalty for an offence against a community see Borough Customs (S.S.), ii, xxxv-xxxvii; and for an early form of this notion see ibid i 30, Customs of Archinfield (1086).

[8] Ine §§ 42, 74; Alfred § 24, "If a neat wound a man let the neat be delivered up or compensated for." There are similar provisions in the Ripuarian and Salic laws, Seebohm, Tribal Custom, etc. 471; Borough Customs (S.S.) ii, xxxix. lx.

been done lingered on in our criminal law till the nineteenth century. Till 1846 the instrument which by its motion directly caused death was forfeit to the crown as a deodand.[1] For a long period there are traces in the law of the idea that damage done by dogs or wild animals kept in captivity could be compensated by giving up the animal, and that the liability only lasted so long as the owner retained his ownership of the offending beast;[2] and it is this principle which governs the earliest law as to the liability of masters for the wrongs of their dependents.[3]

We can see also traces of the *lex talionis*—"an eye for an eye." It appears in a grotesque form in the laws of Henry I.[4] But sometimes the Anglo-Saxon codes represent the primitive ideas of the Old Testament rather than the primitive ideas of the Teutonic race.[5]

The more civilized ideas.

From the earliest period at which we meet the German tribes we find that wrong must be atoned, not merely by *bot* or compensation to the injured man, but also by a *wite* to the king, or other person having authority, or the community.[6] In the *wite* we can see the germ of the idea that wrong is not simply the affair of the injured individual—an idea which is the condition precedent to the growth of a criminal law. A wrong is regarded as the breach of the "*grith*" or "*frith*" or "*mund*" of the king, of a community, of a person responsible for the preservation of order, of the person in whose house the wrong has been done.[7] The idea is that a wrong, if committed within the area which can be said to be under the protection of such a person, injures that person.[8] It is an idea common to many primitive codes. To this idea we must look for one of the origins of what will

[1] P. and M. ii 471, 472; Hales v. Petit (1563) Plowden at p. 260; Holmes, Common Law 24-26; 9, 10 Victoria c. 62; for cases in which the principle has been applied to the rolling stock of railways in cases of railway accidents see Webb, Local Government ii 75 n. 3.

[2] Holmes, Common Law 22, 23; May v. Burdett (1846), 9 Q.B. 101.

[3] Wigmore, Responsibility for Tortious Acts, H.L.R. vii 330-331; Laws of Ine § 74; the more severe principle that payment must also be made occurs in the Laws of Hlotheare and Eadric cc. 1 and 2.

[4] Leg. Henr. 90. 7, "Si homo cadat ab arbore vel quolibet mechanico super aliquem, ut inde moriatur vel debilitetur; si certificare valeat, quod amplius non potuit, antiquis institucionibus habeatur innoxius; vel si quis obstinata mente, contra omnium estimacionem, vindicare vel weram exigere presumpserit, si placet, ascendat, et illum similiter obruat."

[5] Alfred's Dooms c. 19.

[6] Tacitus, Germania c. 12, "Pars multæ regi vel civitati, pars ipsi qui vindicatur vel propinquis ejus exsolvitur;" Chadwick, op. cit. 127-133.

[7] Pollock, Oxford Lectures, the King's Peace; Seebohm, Tribal Custom, etc. 349; Chadwick, op. cit. 115-126, 131-133.

[8] Ibid op. cit. 117.

become, with the growth of royal justice, an environment as necessary and as natural as the air we breathe—the King's Peace. In this period the king's peace has many competitors. Its extent can be accurately measured. It is only on certain occasions, at certain times, or if specially conferred, that a wrong will be a breach of the king's peace.[1] Until a much later period it will die with the king.[2]

Another cause which contributed to the extension of the idea of the king's peace and to the growth of a criminal law is the increase in the number of offences which could not be compensated with money. Even in the earliest period such offences existed. They may then have been the offences which especially offended the moral or religious sense of a warlike community.[3] The introduction of Christianity, and the growing organization of the state, increased the number of these offences, and altered the principle upon which they were based. We can see these later elements, and perhaps an echo of the sentiments described by Tacitus, in Alfred's legislation as to treachery to a lord—legislation which is one of the germs of our law of treason.[4] At the end of the period they comprised also *murdrum* or secret homicide, robbery, coining, theft of property over the value of twelve pence, rape, arson, aggravated assault, forcible entry.[5] And, with the feeling that certain offences are thus unemendable, it came to be thought that such offences should be dealt with by the king.[6] They are a contempt (*overseunessa*) of the king. This idea obviously makes for an extension of the conception of the king's peace, because it tends to emancipate it from the somewhat circumscribed geographical area to which the ideas based upon "grith" or "mund" tended to confine it. We shall see that, in the following period, this idea that a contempt of the

[1] Leg. Henr. 10. 1, 2; 12. 1; 79. 3, 4; P. and M. ii 452.

[2] A.-S. Chron. s.a. 1135, "The king died on the following day after St. Andrew's mass day in Normandy: then there was tribulation soon in the land, for every man that could forthwith robbed another."

[3] Tacitus, Germania c. 12, "Distinctio pœnarum ex delicto. Proditores et transfugas arboribus suspendunt; ignavos et imbelles et corpore infames cœno et pallude, injecta insuper crate mergunt."

[4] Alfred's Dooms (Thorpe i 59), "They then ordained, out of that mercy which Christ had taught, that secular lords, with their leave, might without sin take for almost every misdeed, for the first offence, the money bot which they then ordained; except in cases of treason against a lord, to which they dared not assign any mercy, because God Almighty adjudged none to them that despised him, nor did Christ the son of God adjudge any to him who sold him to death." Cp. Theodore's Pœnitential 1, iv 5 (H. and S. iii 180), if a person kills a bishop or a priest, "regis judicium est de eo."

[5] Leg. Henr. 10. 1; Athelstan i 6, iv 6, v; Ethelred iii 8, 16, iv 5, v 24, 30, vi 28, 37, 39, viii 6; Cnut (Secular) 8, 21, 53, 58, 65, 75.

[6] Leg. Henr. 9. 1, "Qualitas causarum multa est: emendabilium et non emendabilium, et quæ solum pertinent ad jus regium;" see also n. 4.

king's command is an offence against him, which gives jurisdiction to his court, was used both to extend the civil and the criminal jurisdiction of his court, and to introduce the most characteristic of the features of the procedure of the common law—the procedure by royal writ.[1]

Perhaps we may see a third cause which made for the extension of this idea in the breaking up of the solidarity of the kindred. If a man has no kindred, if for any cause a man renounced his kindred, the state steps in and takes their place.[2] The manumitted slave had no kindred.[3] The man of a conquering race might well have no kindred. The king will take the place of kindred. To him some share of the money due must be paid. He will protect them; and in the interests of justice he will hold liable the district where the deed was done.[4] The later presentment of Englishry[5] would thus appear to be founded partially on primitive ideas. The payment made to the king may originally have represented the payment due to the maternal kin.[6]

The more definite organization of the state is a fourth cause which leads to the growth of a criminal law. Neglect of public duties is a definite offence. In the laws of Æthelbert neglect of the fryd occupies almost the first place.[7] The laws of Athelstan, Edmund, and Ethelred penalize those who neglect to keep their men in borh.[8] The laws of Edgar and Cnut fine those who neglect their police duties.[9] In the laws of Henry I. neglect to attend the county court is a contempt of the king.[10] With the great increase in the power of the state after the Norman Conquest we shall see a great and a sudden development of this branch of the law.

The influence of the church accentuated all these tendencies, because, as we have seen, it helped forward the development of the state, it sanctified the royal office, it taught men that the king was the representative of law and order, the maintainer of justice and equity.[11] At the same time the sanctuary afforded by the church mitigated the hardness of a law which was not yet

[1] Below 172. [2] Seebohm, Tribal Custom, etc. 134.

[3] Kemble, Saxons in England 222.

[4] Leg. Henr. 75. 6, 7, "Si Francigena qui parentes non habeat in murdro perimatur, habeat precium natalis ejus qui murdrum abarnaverit; rex de hundreto ubi invenietur xl marc argenti; nisi intra vii dies reddatur malefactor justiciæ regis, et talis de eo justicia fieri . . . ad patrem vero non ad matrem generacionis consideracio dirigatur; omnibus enim Francigenis et alienigenis debet esse rex pro cognacione et advocato, si penitus alium non habeat."

[5] Vol. i 11, 85; vol. iii 314-315. [6] Seebohm, Tribal Custom, etc. 322, 323.

[7] Æthelbert c. 2.

[8] Athelstan c. 20; Edmund (Concilium Culintonense) vii; Ethelred i.

[9] Edgar (Secular) 6; Cnut (Secular) 20, 25.

[10] Leg. Henr. 53. 1. [11] Above 23.

strong enough to be lenient.[1] But all through this period we must allow that from one point of view ecclesiastical influences introduced confusion. The line between offences which should be dealt with as crimes and offences against morality was ill drawn. In England at this period the union between church and state was, as we have seen, very close—closer, perhaps, than abroad. But in England as elsewhere rulers often considered that they were under as strict an obligation to promote morality and religion as to keep the peace.[2] The result is that much of the legislation of the Anglo-Saxon kings is vague and unpractical. More was attempted than would be possible even to a modern state with all the organization and all the orderly instincts of an old civilization. In reading the Anglo-Saxon dooms we are constantly confronted with that contrast between the ideal aimed at and the result accomplished which is present throughout mediæval history.

We see, therefore, some of the beginnings of a criminal law. Wrongdoing is not only the affair of the person wronged. The state is beginning to assert its right to interfere in its own interests. But, as we have seen, all the powers of the state were tending at the end of this period to pass into private hands. The result is a confused mass of many principles old and new. The feud, bot, wer, wite, breach of the king's peace, unemendable wrongs—all find their places in the Anglo-Saxon codes. Rank, time, and place must all be considered before the various sums due from a wrongdoer can be calculated. Whether from this confused mass of rules a criminal law will emerge will depend largely on the personality of those who rule the land.

The Principles of Liability[3]

In the main the principles upon which liability for wrongdoing is based are the logical outcome of a system dominated by the ideas of the blood feud and of bot and wer. When the main object of the law is to suppress the blood feud by securing

[1] Alfred 5, "We also ordain to every church which has been hallowed by a bishop this frith: if a fahman (i.e. one who has exposed himself to the feud) flee to or reach one, that for seven days no one drag him out;" Ine 5; Athelstan iii 6; Edmund 2; Ethelred vii 5; vol. iii 303-307.

[2] Fustel de Coulanges, Les Transformations des Royautés, 533, "Ce que nos sociétés modernes appellent l'ordre, et qui est une chose purement matérielle et exclusivement politique, apparaît à ces générations sous la forme de paix et concorde, c'est-à-dire comme chose morale, et d'ordre à la fois politique et religieuse. Ce gouvernement se donnait pour mission, non pas seulement d'accorder les intérêts humains et de mettre l'ordre matériel dans la société, mais encore d'améliorer les âmes et de faire prévaloir la vertu."

[3] See on the whole subject Wigmore, Responsibility for Tortious Acts, H.L.R. vii 315, 383, 441.

compensation to the injured person or his kin, it is to the feelings of the injured person or his kin that attention will be directed, rather than to the conduct of the wrongdoer. We must have regard to the rank of the injured person or his kin, because, if his or their rank is distinguished, a larger bribe is needed to keep them quiet. This is one of the reasons why the wer varied so greatly. In the later codes the same feeling leads to giving the lord a compensation for the death of his man in addition to a wer to his kin. It leads also, in the interest of the state, to the increase in the wer of officials.[1]

The main principle of the earlier law is that an act causing physical damage must, in the interests of peace, be paid for. It is only in a few exceptional cases that such an act need not be paid for.[2] Even if the act is accidental,[3] even if it is necessary for self-defence,[4] compensation must be paid. "Qui peccat inscienter scienter emendet," say the laws of Henry I., and they say it more than once.[5] A man *acts* at his peril. It is otherwise where he is purely passive and the act is the act of the person injured.[6] These ideas dominate the Anglo-Saxon law. It is true that in certain cases a man appears to be made liable for carelessly doing acts which are obviously dangerous.[7] In one passage in the laws of Alfred there is almost an attempt to establish a standard of diligence.[8] But we must be careful how we read modern ideas into ancient rules. Many of these cases which seem to put liability upon the ground of negligence really illustrate the dominant conception of Anglo-Saxon law—the

[1] Seebohm, Tribal Custom, etc. 134. [2] Above 44.

[3] Leg. Henr. 90. 8, "Si alicujus manus aberraverit, ut alium occidere volens, alium perimat, nichilominus eum solvat;" ibid 75. 3; 90. 1.

[4] Ibid 80. 7; 87. 6, "Si quis . . . monstrare possit, quod assaliatus fuerit, quod coactus et se defendente fecerit homicidium, dignis satisfacionibus hoc monstrare liceat, et rectum inde sit; quia sicut prediximus, multis modis potest homo weram suam forisfacere."

[5] Ibid 88. 6; 90. 11.

[6] Ibid 88. 4, "Si quis in defensione sua lanceam vel gladium vel arma quælibet contra hostem suum extendat, et illa dira nocendi cupiditate cecatus irruat, sibi imputet quicquid habeat;" cp. Brunner, Rechtsgeschichte ii 549, cited H.L.R. vii 317, 318.

[7] Ibid 90. 4, "Quod si in sepem animal inpalaverit, et ipse sepes mentonalis (reaching to a man's chin) non fuerit, dominus sepis interfeccionis seu debilitatis reus judicetur." Cp. Æthelbert c. 7, "If the king's ambiht smith (official smith) or leadrinc (outrider) slay a man let him pay a *medume leodgild*." Seebohm, Tribal Custom 458, 459, thinks that this means that he will only pay a half wergild because he is engaged in a specially dangerous trade; but cp. Chadwick, op. cit. 108, 109, who thinks that "medume" means simply "ordinary."

[8] § 36, "If a man have a spear over his shoulder, and any man stake himself upon it, that he pay the wer without the wite . . . if he be accused of wilfulness in the deed let him clear himself according to the wite; and with that let the wite abate. And let this be, if the point be three fingers higher than the hindmost part of the shaft; if they both be on a level, the point and hindmost part of the shaft, be that without danger."

idea that a man acts at his peril. One of the commonest of these cases is the liability for the negligent custody of arms. Another is the negligent custody of animals.[1] If a man leaves his arms about, and another knocks them over so that they kill or hurt a man, the owner is liable; if a man lends his horse to another, and ill befalls the borrower, the lender is liable;[2] if a man asks another to accompany him, and the other is attacked by his enemies while so accompanying him, the man who made the request is liable.[3] It is clear that such liability is founded not upon negligence, but upon an act causing damage. The liability so imposed stretches far beyond the proximate consequence of any supposed negligence. The law is regarding not the culpability of the actor, but the feelings of the injured person whose sufferings may be traced ultimately to the act. This idea is well illustrated by the oath which a defendant must swear if he would escape liability. He must swear that he has done nothing whereby the person slain was "nearer to death or further from life."[4] It is practically only when a person slain has himself alone to thank, when the defendant has been purely passive, that liability will not be imputed.[5] These ideas lived long in the law. In the time of Bracton the man accused of homicide must make the same allegation as is required in the laws of Henry I.;[6] and till 1828 the man who committed homicide by misadventure or in self-defence did not in theory escape unpunished.[7]

We have seen that there are some traces in Anglo-Saxon law of noxal liability. The owner of a thing through which harm has been done is guilty unless he will surrender it.[8] In some cases this rule may have helped to strengthen the idea that a man is liable for any act to which damage can be traced. If a man's sword has been used to kill, the owner is liable, either as the owner of a guilty thing, or because, by allowing it out of his control, he has done an act which will prevent him from saying that he has done nothing whereby the deceased was

[1] Ine c. 42; Alfred c. 24. [2] Leg. Henr. 87. 1, 2; 90. 11. [3] Ibid 88. 9.

[4] Ibid 90. 11, "In quibus non potest homo legitime jurare, quod per eum non fuerit aliquis vitæ remotior, morti propinquior, digne componat, sicut factum sit;" P. and M. ii 468, 469; we see traces of these ideas in the Borough Customs, Borough Customs (S.S.) ii xl; Miss Bateson there says, "Ancient law could not discuss the question of intent because it had not the machinery wherewith to accomplish enquiry . . . offences which were not criminal could be made the ground of an appeal of homicide if they could be put forward as conducing, however indirectly, to a death;" cp. ibid lxxxiv, at Dublin, if one took another's servant without warning, he was liable in life and limb for any death that took place in the late master's household owing to the want of a servant.

[5] Above 51. [6] f. 141.

[7] 9 George IV. c. 31 § 10; below 259, 358-359. [8] Above 46.

nearer to death and further from life.[1] On whichever ground we put the liability, we are far from the modern ideas which ground liability upon some moral deficiency actually existing or presumed to exist.

The liability of one who has slain another in self-defence or by misadventure, the deodand, the remoteness of damage for which a man may be liable, show clearly upon what a primitive foundation are based the ideas as to liability to be found in the Anglo-Saxon codes. They were beginning to look archaic in the laws of Henry I.; but they still lived on. Some of them reappear in Blackstone's Commentaries; and even then they have a few more years of life. We can want no better illustration of the continuity of English law.

These ideas were, as I have said, beginning to look archaic even in the laws of Henry I.[2] We can see that some attention was being paid to the culpability of the delinquent. This was largely due to the influence of the church; and, as we have seen, the boundary line between church and state, between morals and law, was not clearly drawn. The ecclesiastical laws and the pœnitentiaries naturally looked primarily at the state of mind of the individual sinner. They were concerned to save the souls of sinners, not to stay the blood feud.[3] "The sense of individualism in Christianity was opposed to the solidarity and joint responsibility of the kindred."[4] In the laws of Cnut it is said that, if stolen property were found in a man's house, it was at one time thought that his infant child was "equally guilty as if it had discretion"—"but henceforth I most strenuously forbid it, and also very many things that are very hateful to God."[5] It is recognized in the laws of Henry I. that the lunatic and the infant cannot be held liable, though it does not follow from this that those responsible for their custody will entirely escape.[6] The man whose conduct has only remotely caused death or injury is liable, it is true; but "in hiis et similibus, ubi homo aliud

[1] We seem to see a confusion of the two ideas in Leg. Henr. 87. 2. The writer is considering the question of the liability for damage done by the arms of a man while out of his custody. The owner, to escape liability, must swear that he knew nothing of the act, and should see to it that "ea non recipiat antequam in omni calumpnia munda sint."

[2] In these laws we get the sentence "reum non facit nisi mens rea" (5. 28). This sentence is applied to perjury. As Maitland says (P. and M. ii 475), "that any one should ever have thought of charging with perjury one who swore what he believed to be true, this will give us another glimpse into ancient law."

[3] Theodore's Pœnitential, I. iv (H. and S. iii 180), killing "odii medietatione," "per jussionem domini," "per iram, casu, per poculum, per rixam" are distinguished. Cp. Bede's Pœnitential iv (H. and S. iii 330).

[4] Seebohm, Tribal Custom, etc. 385. For a similar development in Burgundian and Wisigothic law see ibid 123-128.

[5] Laws of Cnut § 77; Thorpe i 419-420. [6] Leg. Henr. 59. 20; 78. 6, 7.

intendit et aliud evenit, *ubi opus accusatur non voluntas*, venialem pocius emendacionem, et honorificenciam judices statuant, sicut acciderit."[1] The man who has killed by misadventure or in self-defence is liable to pay the wer, but his wrong is emendable. So unjust was this strict rule as to liability beginning to appear that the writer feels that he must explain it. "Every outlaw," he says, "is brother to another; and he who answers a fool according to his folly is like unto him."[2] Such a rationalistic explanation shows that the rule is beginning to look archaic. Even in this period it is possible that the rigour of the old rules was reconciled with more advanced ideas by the help of the king's power to pardon.[3] The fact that in some of these cases no *wite* was due shows that the more modern ideas of criminal law, which the wite represents, were based rather upon the culpability of the wrongdoer than upon the feelings of the injured party.[4]

When in the following period these more advanced ideas gain greater influence, when all serious crime comes to be regarded as an offence against the king, the royal power to pardon will help to reconcile the new ideas with the old. The king, it is true, will not be able to prevent the injured man or his kin from prosecuting an appeal for bot or wer upon the old principles. But when bot and wer become obsolete, when crimes which call for punishment become differentiated from torts for which damages can be obtained, the ideas which ground criminal liability upon moral delinquency will have freer play—so much free play, in fact, as is consistent with political expe liency. Some of these ideas will also be extended to civil liability. The old ideas will live on in the law, just as trial by battle and compurgation lived on, simply because they are obsolete.

§ 3. The Law of Property

All systems of law must recognise the distinction between movable and immovable property. The physical difference necessitates at all times a difference in legal treatment; but the extent and the details of this difference in legal treatment will depend upon many different accidents of time and place. In a pastoral society it is the cattle rather than the land which possess value. In a primitive agricultural society, where population is sparse and land is plentiful, the land brought

[1] Leg. Henr. 90. 11. [2] Ibid 84.
[3] Ine c. 36; Edgar ii 7; Edward the Confessor xviii.
[4] Alfred § 36; above 51 n. 8; Leg. Henr. 88. 3.

under cultivation no doubt possesses value; but it is still the stock—the movable property by which the land is cultivated—which possesses the most value. "Res mancipi" will cover almost all known forms of property; and res mancipi comprise many other things besides land. No doubt with the advance of civilization and the growth of population land will become more valuable. But to say that it is ever more valuable and more important than movable property, for the production of which it exists as a valuable commodity, would amount to saying that the raw material is more valuable than the instruments of production and the manufactured product. Intrinsic value is not, however, an infallible test of legal importance. For many reasons the land law must, certainly in primitive times, be more important than the law about movables.

(1) As soon as the state attains any degree of organization, as soon as its law begins to be obeyed, the state will find it necessary to levy some sort of contribution for its support. The history of taxation in our own country shows us that it is comparatively easy to put a tax upon a visible tract of land, but that it is a task altogether beyond the strength of the nascent state to tax property which can be moved, or destroyed, or concealed. Because it is immovable, land is important, not only in the law of property, but also in constitutional law.

(2) The land which the state will tax will be cultivated land. In a primitive society mere waste land can never have any taxable value. The amount of land which a man has is taken as an index of the possession by him of movable property—of a certain stock, a certain capital. But when the law looks at things from this point of view it is taking up the position that land is the most important kind of property, and that movable property is accessory to it.

(3) We have seen that under feudal conditions the powers of the state are divided among the larger landowners. The land law, therefore, becomes important because the distribution of land will determine not only the wealth and taxable capacity of the subjects of the state, but also the political and social position of those inhabitants.

It is for these three reasons that the land law is more important than the law as to movables in the Anglo-Saxon period—certainly at the latter part of the Anglo-Saxon period. The growth of feudal conditions, and the levy of the Danegeld,[1]

[1] Vol. i 21-23; below 155-156.

make the land and the land law so important that all questions of Anglo-Saxon law and history seem ultimately to depend upon the modes of cultivation, the modes of land measurement, the modes of land owning known to our forefathers. We shall see that in the following period the land law will gain rather than lose in importance to the historian of law; but with the growth of a state strong enough to combat feudal tendencies, it will gradually cease to be identified with constitutional law, and it will become again simply the law of property. I shall therefore, in discussing the law of this period, deal first with the land law, and secondly with the law as to movable property.

The Land Law

We cannot understand the terms used by the documents which contain the records of the land law of the Anglo-Saxons unless we know something of the methods of cultivation employed. In the first place, therefore, I must say something of the methods of cultivation and land measurement. I can then deal with the different kinds of land ownership known to the Anglo-Saxons, with their incidents, and with the modes of conveyance.

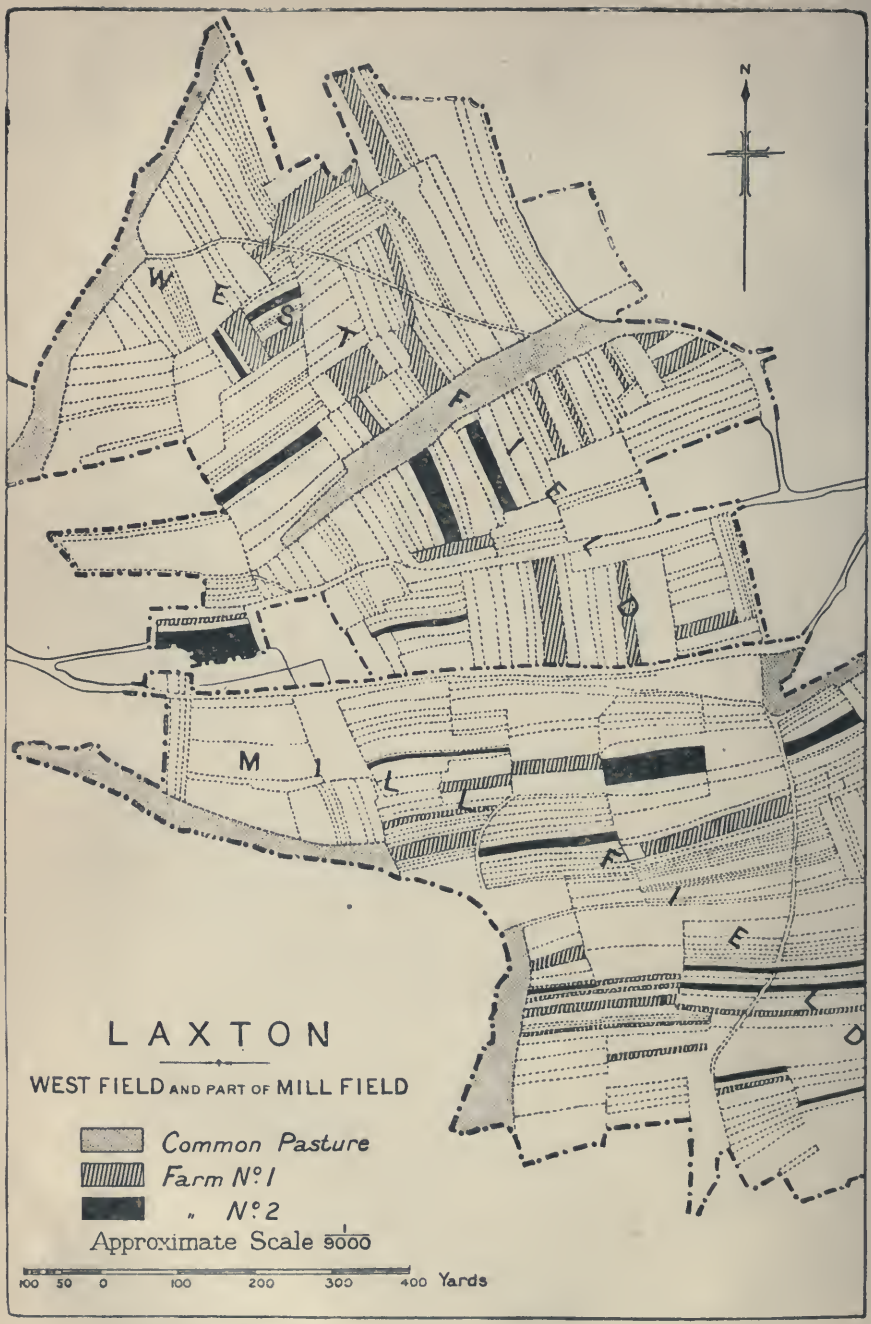
(i) Methods of cultivation and land measurement.

The method of cultivation which prevailed over the greater part of England was that known as the common or open-field system.[1] We shall see that this system has had an extraordinarily long life. Without some knowledge of it we can understand neither the land law of this period and the next, nor much of the legislation of all centuries from the sixteenth to the nineteenth upon agricultural topics.

All the land of the township was divided up into two or three open and unenclosed fields (*campi*), which were cultivated in a certain rotation. Each of these fields was divided up into a number of strips (*seliones*). The average strip was often about the size of an acre. It was a furlong (forty rods) in length, i.e. "the length of the drive of the plough before it is turned,"[2] and four rods, i.e. four furrows of the plough, in breadth. The strip was therefore four times forty square rods lying side by side. Forty square rods = one rood; and four roods = one acre.

[1] Seebohm, Village Community chap. i; Domesday Book and Beyond 379 seqq.; Cunningham, Growth of English Industry i 73; Nasse, Village Community; Vinogradoff, Manor 165-185; a very complete account is given by Dr. Gilbert Slater in his valuable book on the English Peasantry and the Enclosure of Common Fields; see also Gonner, Common Land and Enclosure; A. H. Johnson, The Disappearance of the Small Landowner; Webb, Local Government ii 75-87.

[2] Seebohm, op. cit. 2.



Map Showing Method of Land Cultivation

There were of course many varieties in the size of the acre. We often find half-acre strips; and, as we shall see, in earlier times, the size of the acre varied with the locality.[1] We must not expect uniformity in weights and measures until we get uniformity in law. These strips were divided from one another by turf balks, i.e. two or three furrows were left unploughed between each strip. These strips were grouped together in the common field in shots (*quarentenæ* or *culturæ*), divided off from the other shots by broader balks. A path running along the narrow end of the strips inside the boundaries of the shot is called a *headland.* When one lot of strips meets another at right angles they are sometimes called *butts*. Corners of the field which cannot be fitted into the regular arrangement of the strips are sometimes called *gores* from their pointed ends.

As will be seen from the map, each of the landowners of the township possessed a number of these scattered strips in the open fields. "The several holdings were made up of a multitude of strips scattered about on all sides of the township, one in this furlong and another in that, intermixed and it might almost be said entangled together, as though some one blindfold had thrown them about on all sides of him."[2]

Attached to the holdings were certain common rights. (1) If there were three open fields, one, and sometimes two, remained fallow in each year.[3] After the crop was cut, and while the field was fallow, the cattle of the villagers could pasture over the common field. In many places we get what are called Lammas meadows. They are meadows upon which hay is grown, which are divided into strips and subject to individual ownership while the hay crop is growing, but common to the township after the crop has been gathered in.[4] (2) As a general rule there were extensive waste lands bordering upon the township upon which the cattle of the township, or of two or more adjoining townships, could graze at will. These rights will become more interesting to the lawyer as the quantity of waste land becomes more restricted. They will gradually come to be regarded as inseparably annexed to the holdings in the township, subject to any rules which the community may make for them.[5] We can see in these rights the germs of common appendant and

[1] Below 64 n. 6. [2] Seebohm, op. cit. 7.

[3] Domesday Book and Beyond 365, 366; Cunningham, op. cit. i 73-75; Vinogradoff, Manor 173, 174.

[4] Plac. Abbrev. 306; Corbet's Case (1585) 7 Co. Rep. 9.

[5] Vinogradoff, Manor 166-170; for some interesting orders of the court of the Manor of Great Tew as to commons and other matters relating to the working of the common-field system in 1692, 1756, 1759, and 1761, see Webb, op. cit. ii 80-87; probably at all periods in history similar regulations were needed to keep the system working, see E.H.R. xxxvii 409-413.

common *pur cause de vicinage*. But it is not till much later that we get any definite classification of the various rights of common.[1]

Such in outline was the common-field system of agriculture. We can trace its presence at all periods of our history almost up to the present day.

In the Saxon period the laws of Ine contain a clear reference to strip holding. "If ceorls have common meadow or other land divided into strips, and some have fenced their strip and some not."[2] We can see in the boundaries, which the land books contain, all the characteristic features of the open-field system. In the example cited by Seebohm we have mention of headlands, gores, and furlongs.[3] We also get references to parcels of land contained in one grant but lying in different places, and to rights of common belonging to the township.[4] We get the word "campus" used, which is the Latin equivalent for the open field.[5] We must not expect to find in Domesday Book direct evidence as to the modes of cultivation. Domesday Book was, as we shall see, a description of the country with a view to its assessment for the Danegeld—a rate book on a large scale.[6] But, says Mr. Round,[7] "from behind the veil of the great record there peep irresistible ever and anon the familiar features of the village community. We have clear glimpses, under their actual names, of its three essential land divisions—the *campi* or great open fields, the *culturæ* or shots into which these fields were subdivided, and even the acre strips themselves, the acre strips which had to be ploughed, and the acre strips which had to be sown. . . . Lastly, we have the three typical services of the community which dwelt within the shell (to adopt Mr. Seebohm's simile), the *opus* or week-work, the *precariæ* or bene work, the *gablum* or gafol, all of them distinctly entered." In the Hundred Rolls, in the manorial extents, and in the court rolls and cartularies of the thirteenth century, we have abundant evidence of the prevalence of this mode of cultivation. The Hundred Rolls show us the acres separately owned; if a whole

[1] Vol. iii 143-151. [2] Ine § 42. [3] Village Community 107, 108.

[4] Kemble, C.D. no. 276, "Unam villam . . . et x jugera a meridiano plaga villuli illius adjacentia necnon et duo jugera prati et x carros cum siluo honestos in monte regis et communionem marisi quæ ad illam villam antiquitus cum recto pertinebit;" no. 1278, "Quandam ruris particulam v videlicet cassatos cujusdam loco sed communis terræ."

[5] Ibid no. 1278, "Tam in magnis quam in modicis rebus *campis* pascuis pratis silvis." See generally Vinogradoff, English Society 260, 261, 277-279.

[6] Below 155-156.

[7] Domesday Studies i 221, 222, and references there cited; cp. D.B. i 156b (Garsington, Oxfordshire), "Ibi i hida de inland quæ nunquam geldavit jacet inter terram regis particulatim," cited Pollock, E.H.R. xi 215.

field belongs to one owner it is noted as "separalis."[1] Any manorial extent will show the demesne of the lord scattered in the common fields. The extent of the manor of Bernehorne, belonging to Battle Abbey, taken in 1307, is a good example.[2] In the custumal of the manor of Wye[3] a person owned "circa iiii acras in tribus locis." There are many similar instances in the Domesday of St. Paul's.[4] A case on the rolls of the manors of the abbot of Ramsey details an attempt of an avaricious strip-holder to enrich himself at his neighbours' expense.[5] Even in the works of writers like Bracton, who are occupied rather with legal theory than with agricultural phenomena, we get occasional glimpses of the actual fields.[6] We see the same system in the mediæval conveyances of land. There are several instances given by Madox.[7] Seebohm has given a very good instance of the year 1346 from the Winslow manor rolls. The virgate of one John Moldeson was let out by the lord to several new tenants. It therefore became necessary to describe the various parts of which it consisted. It appears that it consisted of no less than seventy-eight fragments.[8]

[1] R.H. ii 600, "Idem Abbas (Ramsey) habet in Brouton in dominico suo iiii carucatas terræ et quinque acras prati infra manerium, et in pratis Sancti Yvonis iiii acras prati, et in pratis de Houton iii acras prati pertinentes ad manerium de Brouton;" ibid ii 585, "xiiii acras terræ in campis;" ibid ii 529, "xixx acri in uno clauso;" ibid ii 645, the abbot of Thorney "habet pasturam separalem quæ continet iiii acras."

[2] Custumals of Battle Abbey (C.S.) 17; cp. 137; Ramsey Cart. (R.S.) i nos. 205, 209, 210; Guisboro Cart. (Surt. Soc.) i nos. 82 and 519; Rievaulx Cart. (Surt. Soc.) 320 (extract from ministers' accounts of 30, 31 Henry VIII.).

[3] Custumals of Battle Abbey (C.S.) 135.

[4] An enquiry made into the manors of the dean and chapter of St. Paul's in 1222 (C.S.) cxxii 86.

[5] Select Pleas in Manorial Courts (S.S.) 93, "And they say that Reginald Boneyt near Westereston has taken to himself to form part of the rood that he holds three furrows subtracted from all the sulungs which abut upon that rood; also at Arnewassebroc he has appropriated to the headland that he holds three furrows from all the sulungs that abut upon that headland."

[6] f. 167, "Poterit enim esse tenementum commune inter duos vel plures, sicut sunt bundæ et metæ et rationabiles divisæ quæ ponuntur in terminis et finibus agrorum ad distinguendum prædia et dominia vicinorum quorum quilibet dominus est proprietatis et non dominus in solidum, sed tamen dominus in commune;" he goes on to explain that he who ploughs up the balks commits a disseisin; cp. ff. 228b, 266, 269.

[7] Formulare Anglicanum no. 270 (an exchange of land dated 1258), "In escambium aliarum duarum acrarum et dimidiæ in Campo de *Cundicota*, sic jacentium; Quarum prima dimidia acra vocatur *Pikedehalfaker*, et se extendit in viam quæ ducit de *Cundicota* versus *Hunchewik* juxta terram Mariæ; secunda dimidia acra jacit in *Cumbewellesclade;* tercia dimidia acra jacit in *Lutleburia;* quarta dimidia acra se extendit ultra viam de *Stonwa* usque ad campum de *Reninton;* quinta dimidia acra se extendit juxta viam quæ vocatur *Grenedich.*" Cp. nos. 258 and 267.

[8] Village Community 24-27; cp. R. Hist. Soc. Tr. N.S. xix 106; Scrutton, Commons chap. vi; Domesday Studies i 57-60 for other instances; in Buckinghamshire in 1794 a holding of one acre was in eight places; in Gloucestershire there was a case in which a man was obliged to travel several miles to visit all his strips; for a case of 1568 where this system caused difficulty in ascertaining the boundaries of land which had been purchased see Temple *v.* Cooke and Wotton, Dyer 265b.

This system of agriculture came to appear more and more anomalous with the lapse of time. It was impossible to do anything without the consent of a large number of persons who were not likely to agree; and any attempts to carry through improvements were met by the decided opposition of what was in those days the most ignorant and conservative class in the community.[1] We are not surprised, therefore, to hear that it was denounced by all writers on agriculture from the sixteenth to the nineteenth century. Tusser and Fitzherbert, in the sixteenth century,[2] Taylor and Worlidge in the seventeenth century,[3] Arthur Young and many other writers of the eighteenth century showed clearly enough the mischief resulting from it.[4] But, though some enclosures took place in the sixteenth and seventeenth centuries,[5] large masses of land remained unenclosed—it was so common in the seventeenth century that it was transplanted by the early colonists to New England.[6] One reason for its long life was no doubt the fact that the attempt to alter the existing common-field system was often combined with the extensive enclosure of common land, which reasonably enough roused much popular feeling.[7]

An attempt was made in George III.'s reign to give to the various proprietors in the common fields the power to meet together and make new regulations and improvements in the accustomed mode of agriculture. But the agreement of three-quarters of the number and value of the owners was required.[8] The machinery of a private Act of Parliament was found to be more efficacious; and between 1760 and 1844 nearly half the parishes in England were enclosed by this means.[9] But it is clear from the report of the select committee on commons enclosure in 1844 that the common field system still prevailed over

[1] For an account of the opposition aroused by the project of draining the fens in the Eastern counties see Cunningham ii 114-119, and Scrutton, op. cit. 105-108; Bk. iv Pt. I. c. 2; we have an instance at Castle Combe in which the change was made by agreement before the close of the seventeenth century, History of Castle Combe 321.

[2] For these writers see Scrutton, Commons 126-128; Cunningham i 527-529.

[3] Ibid ii 552.

[4] Ibid ii 552-555.

[5] Bk. iv Pt. I. cc. 2 and 7.

[6] Cunningham ii 548 n. 1.

[7] Hales, one of Edward VI.'s commissioners appointed to enquire into the agricultural distress, draws the distinction clearly. The enclosure of a man's own property, where there are no rights of common, "is very beneficial to the commonwealth." What is not beneficial is, "when any man has taken away and enclosed any other men's commons, or hath pulled down houses of husbandry and converted the lands from tillage to pasture," Strype II. ii 362; for this matter, and for the clear distinction drawn by the Tudor legislation between those two different kinds of enclosure, see Bk. iv Pt. I. c. 2.

[8] 13 George III. c. 81; Williams, Commons 76.

[9] For a good account of these Acts see Gonner, op. cit. 58-95.

a large part of England.[1] In the following year an Act was passed which gave facilities for the enclosure and partition of the common fields.[2] In consequence of this and later Acts this antique method of cultivation has been rapidly disappearing. It is said, however, that as late as 1879 the extent of the common fields still remaining was estimated at 264,000 acres.[3] In 1901 and 1902 further enclosures of common fields were made.[4] There may still be some waiting to be enclosed.

Such, then, in outline, was the common field system. We naturally ask ourselves why and how was the system devised.

The *raison d'être* of the system was probably the desire to secure equality. If we desire to divide equally a tract of land between various persons we must have regard, not merely to the superficial area, but also to the quality of the land. At the present day we should take all the circumstances into consideration, and give to one a larger area, to another a smaller area, compensating by area for deficiency in value. Such calculations are quite beyond the powers of a primitive community. They adopt the simpler plan of giving to each a little bit of the good, a little bit of the indifferent, a little bit of the bad. We get an instructive glimpse into the working of these ideas from the case of an actual partition of property effected in the twelfth century.[5] The fee of Wahull was divided between the lords de Wahull and de la Leye. Segeho was parcel of the fee and contained eight hides. During a time of disturbance these eight hides had been appropriated, and their ownership had become altogether uncertain. To remedy the confusion the lords de Wahull and de la Leye held a full court, and six of the oldest inhabitants were entrusted with the duty of parcelling out the land anew. Each of the tenants surrendered his holding. The six divided the eight hides into sixteen strips (*buttos*). To each hide two were apportioned, so that each holder of a hide or part of a hide got a strip or strips in different parts of the newly-divided area.

[1] Nasse, Village Community 6, says that at the end of the eighteenth century the system was found in all parts of the country, e.g. in Northamptonshire 89 parishes out of 317; in Oxfordshire over 100 parishes; in Warwickshire 50,000 acres; in Berkshire half the county; in Wiltshire the greater part of the county; in Huntingdon 130,000 out of 240,000 acres; Scrutton, Commons 113, 114, 133, 136. Cp. Report of the Select Committee on Commons Inclosure 17.

[2] 8, 9 Victoria c. 118; for an exhaustive account of this and later Acts see Halsbury, Laws of England iv 540-601.

[3] Brodrick, English Land and Landlords 53.

[4] R. Hist. Soc. Tr. N.S. xix 101 n. 3, "In 1901 the enclosures of common fields in Sutton, Northamptonshire, and Skipwith, Yorkshire, were approved; and in 1902 some acres of Chipping Sodbury, Gloucestershire; the fields at Ewelme in Oxfordshire have never been legally enclosed, but for many years the proprietors have agreed to keep their own fields, and most rights of common have been abandoned."

[5] Vinogradoff, Villeinage in England 233, 234, App. no. xiii.

This shows, as Sir Paul Vinogradoff says, that "the intermixture of strips was a direct consequence of the attempt to equalize the portions."

This solution of a difficult problem is natural to a state of society in which the land is cultivated by groups of persons rather than by individuals; and a cultivation by groups is the phenomenon which we see everywhere in our earlier history. We cannot stop at this period to ask refined questions as to the amount of communalism or the amount of individualism which there is in the ownership of the proprietor of a number of scattered strips. Such questions asked at too early a period in the history of law lead rather to ingenuity in argument than to any practical result.[1] But it would perhaps be true to say that this common-field system forms the stage which is intermediate between the very primitive period when permanent ownership in land is unknown, and the modern conception of separate and individual ownership.

Of the very primitive period Cæsar's[2] account of the Gallic tribes may be taken as a description. They are a pastoral and a vagrant people. They cultivate each year enough land to supply themselves with corn. Then they move on to fresh fields and pastures new. "Privati ac separati agri apud eos nihil est, neque longius anno remanere uno in loco incolendi causa licet." The description of Tacitus may or may not refer to the same tribes as those described by Cæsar. It has been often quoted and variously interpreted. Perhaps it indicates a slight advance upon the stage described by Cæsar. The tribes which Tacitus describes dwell in small communities. Each person has his own homestead as his separate property.[3] The arable is divided year by year among the villagers and ploughed afresh. It is possible to do this because there is abundance of land to spare.[4] The system seems analogous to that carried out by the Welsh tribesmen. "It was an annual ploughing up of fresh grass land, leaving it to go back again into grass after the year's ploughing."[5]

The common-field system is an advance on this. It is like the older system, it is true, in that the land is cultivated by communal action, and is subject to a common course of cultivation. The villagers have certain rights of common in the waste. There is that feeling of jealousy of strangers which is

[1] For a discussion of the question see Domesday Book and Beyond 346-350; Vinogradoff, Manor 150, 151, 210.

[2] De bello Gallico iv 1.

[3] Germania c. 16, "Vicos locant non in nostrum morem connexis et cohærentibus ædificiis; suam quisque domum spatio circumdat."

[4] Ibid c. 26, "Agri pro numero cultorum ab universis in vices (*al.* vicis *or* invicem) occupantur, quos mox inter se secundum dignationem partiuntur. Arva per annos mutant et superest ager." Cp. Pollock, Land Laws App. note A.

[5] Seebohm, Village Community 369.

characteristic of small communities[1]—a jealousy of which we may see survivals in some manorial customs.[2] Nevertheless it is the agriculture of a more settled society. Not only is the homestead separate and individual property, but also the scattered strips of the arable in the common fields, and the strips of the meadow till the hay harvest is over. To use the striking simile of Sir Paul Vinogradoff, it is like "the ice-bound surface of a northern sea. It is not smooth, although hard and immovable, and the hills and hollows of the uneven plain remind one of the billows that rolled when it was yet unfrozen."[3] It is far removed, as I have said, from modern ideas of separate and individualistic landowning; but it is a step in that direction.

This, then, was the mode of cultivation which we find over the greater part of England—but not over the whole of England. In some parts of England we find existing up to a late period a system more akin to that described by Tacitus.[4] In the south and west we meet with villages of quite another type—villages of scattered hamlets which pay a certain food rent to the crown or other lord.[5] Probably some of them had always been dependent since the land had been conquered by the Saxons. From the survivals we can see that the tenure of the lands is often very precarious.[6]

In later law there are many incidents of copyhold tenure which cannot be understood unless we keep in our minds the main features of the agricultural system of the original settlers. We must over the greater part of England keep in our minds the common-field system. In the south and west we must keep in our minds settlements of scattered hamlets, which were sometimes in a condition of dependence upon a king or other lord.

Besides knowing something of methods of cultivation, we must also know something of the methods of land measurement if we are to understand the documents in which our land law is

[1] Salic Law, De Migrantibus.

[2] Rowles v. Mason (1613), 2 Brownl. 192, 199, "So also is the custom at Hamm in Middlesex, if any copyholder will sell, the next *Cleivener*, which is he that dwelleth next unto him, shall have the refusal, giving so much as another will, and he which inhabits on the east part first, and the south and the west and last the north shall be preferred . . . and so is the custom in Gloucester."

[3] Villeinage in England 403, 404.

[4] Cunningham ii 548 (citing Arthur Young's Northern Tour ii 7) says that in some parts of Yorkshire in the eighteenth century the farmers ploughed up a fresh part of their sheepwalks to take a crop or two and then let it lie fallow for fifteen or twenty years; Nasse, Village Community 11.

[5] Domesday Book and Beyond 15, 16; Seebohm, Village Community 181-186; Pollock, Land Laws App. 210-212; E.H.R. xi 229; Vinogradoff, Manor 147, 148; Ballard, Domesday Inquest 45, 46.

[6] Elton, Custom and Tenant Right 71, 72.

contained. Here again we find vague and primitive methods employed. Long measure, square measure, and cubic measure have not yet made their appearance; and if we try to express ideas as to size and quantity without these tables we shall find that it is impossible to do so with any accuracy. We should be driven to employ vague comparisons. In small matters we might use the hand or the foot. For larger spaces we should probably be obliged to use other comparisons. In the case of land, upon which an agricultural community depends, the most obvious measure of comparison is the amount which will support a man and his family. This amount of land we find called by various names—*familia, mansio, hide.*[1] This seems to have been the meaning of the term "hide" in the oldest documents. What this amount of land was, expressed in modern terms, is a subject upon which there has been a vast amount of controversy. As Maitland points out, the answer to the question is very important, because upon it depends the question whether the English at the time of the Saxon conquest were a race of substantial yeomen or a race of small cottagers.[2] It is probable that it was a fairly large tract—a tract of about 120 acres. The strongest argument in support of this view is to be found in the fact that the Domesday hide was undoubtedly a tract of this size.[3] We know that many monasteries were at all periods of Saxon history endowed with many hides of land by the Saxon kings. The number of hides attributed to them by Domesday does not differ materially from the number of hides which the land books convey to them.[4] Again, many writers of the twelfth and thirteenth centuries all concur in so stating the size of the hide.[5] We may take it therefore that the hide meant originally the amount of land necessary to support a family, and that came to correspond, on the average, to an amount of about 120 acres scattered in strips in the common fields.[6]

[1] Domesday Book and Beyond 358-360; Ballard, Domesday Inquest 32, 33.

[2] Domesday Book and Beyond 355. For other theories see ibid 485-489; on the whole subject Vinogradoff, Manor 150-164.

[3] Round, Feudal England 36-44. In the will of Ælfgar (A.D. 958), Thorpe 505, 508, a hide is stated to consist of 120 acres; and Sir F. Pollock does not consider that the explanatory words are a gloss, E.H.R. xi 217, n. 29.

[4] Domesday Book and Beyond 491-494.

[5] Dialogue of the Exchequer i 17, "Hida a primitiva institutione ex centum acris constat." For other passages see E.H.R. xi 218 and notes.

[6] It is only an average because, "apart from local variations in the quality of the soil and the strength of the teams employed, we have to reckon with at least two factors of first-rate importance which modified such averages, namely, the diversity between the two-course and the three-course system of agriculture, and the difference in the importance of agriculture as compared with pastoral pursuits," Vinogradoff, Manor, 162; in 1310-1311 Bereford, C.J., said, "Carucates and bovates of land are grosses and entireties. And when they pass by feoffment they pass as grosses and not by number of [acres]. . . . Some carucates and bovates of land are held for more and some for less acres," Y.B. 4 Ed. II. (S.S.) 46; in the fifteenth century the variation

In course of time the term "hide" came to have other meanings. It was appropriated by the legislator legislating upon things fiscal; and, as we know from Finance Acts and from Workmen's Compensation Acts, legislators will make one word express many ideas. Like the word "value" in our days, the word "hide" came to mean different things for different purposes. We have seen that those who possess a certain number of hides tend to take a more prominent position in the state. They are made more immediately responsible for military service and other public duties; and among these duties the collection of the Danegeld took a very important place at the end of this period. The hide therefore came to be something more than a tract of land. It became at an early period a basis for calculations as to the imposition of public burdens. A tax of a certain sum is placed on the hide. A county, a hundred, or a vill will be obliged to account for the sum due for so many hides. It will soon be said that these districts contain so many hides because they are rated at that number.[1] Different districts will fluctuate largely in taxable value in different periods—"Agrarian history becomes more catastrophic as we trace it backwards."[2] A complaint that a district is over-taxed will take the form that it has been assigned too many hides. Some districts will as a privilege be "beneficially hidated," i.e. they are rated at few hides in comparison with the real number of hides which they contain. As Sir F. Pollock says,[3] "The old assessment, probably very rough to begin with, was badly out of date in the eleventh century, and one object of the [Domesday] survey was to ascertain how capricious its results had become." In this manner the hide, originally a very rough measure of quantity, became a very artificial unit in a primitive system of taxation.[4]

in the quality of the soil was regarded as the chief cause of this diversity, see Y.B. 35 Hy. VI. Mich. pl. 33 (p. 29), Prisot, C.J., says, "Un carue de terre est grand en ascun pais que n'est en auter pais; et uncore, mesque un soit moins que un auter, chescun per luy est un carue, car un plough puit arrer plus terre en l'an en ascun pais que en auter pais."

[1] Round, Feudal England 44-69; cp. Ballard, Domesday Inquest 65 for the view that the hide was from the first simply a unit of assessment; Chadwick, op. cit. 268, says, "Whatever may have been the normal size of the individual hide from time to time, the hide in the aggregate was from the earliest times a unit, presumably for fiscal and military purposes, imposed from above;" that the hide was also a real measure of land is made clear by Vinogradoff, English Society 200-206; Mr. Round points out that the hides were generally imposed upon the vills in multiples of five.

[2] See Vinogradoff, English Society 297-299 for instances.

[3] E.H.R. xi 217; Vinogradoff, English Society 153, "It [the geld system] was to a very great extent a record of antiquated repartition; it presented all sorts of local varieties; it was, moreover, traversed by an enormous number of exemptions and privileges;" see ibid 178, 179 for some of the causes of beneficial hidation; and on the whole subject of fiscal immunities ibid Essay i Sect. iii chap. ii.

[4] Domesday Book and Beyond 390-393, 470-473; Domesday Studies i 16-18; Vinogradoff, Manor 153.

Another primitive measure of land is the "carucate." The *caruca* means the plough team; and this mode of measurement seems to be founded upon a consideration of the amount of land which the plough drawn by a team of eight oxen will cultivate in the year. We find this measure used in Suffolk, Norfolk, Yorkshire, Lincolnshire, Derby, Nottingham, and Leicester. It seems to answer in all respects to the hide in its extent; and, like the hide, to have been used as a fiscal unit.[1]

When the hide and carucate had thus become artificial fiscal units it was necessary to find some word or phrase to express the real measure or agricultural capacity of a given piece of land. The Domesday commissioners adopted the expedient of returning the number of plough teams of eight oxen which the land could support. Thus, "Terra ad i carucam," means the land which in that district could be tilled by one such team.[2] As we have seen, its size varied from district to district.[3]

I must now say something of the subdivisions of the hide and carucate. These subdivisions never became fiscal units. They were always measures of quantity. The hide was divided into virgates and acres. With the acre I have already dealt. The term "virgate" meant a *virga*, i.e. a rod or yard of land. We have seen that each acre generally consisted of four rods or furrows lying side by side. Hence the *virga* or rod means the quarter of an acre. But if you are reckoning in hides and not in acres, the same term "virgate," which means one-fourth of an acre, is used to signify one-fourth of a hide, i.e. a holding of about thirty acres in the common fields.[4] The carucate is generally divided into ox gangs or bovates. They were the eighth of a carucate, i.e. the amount of land which can be ploughed by one ox.[5] Generally they were about fifteen acres in extent; but in the north there were great variations.[6]

The Kentish mode of measurement is peculiar. The unit

[1] Domesday Book and Beyond 395; English Society 147, 148; Ballard, Domesday Inquest 40. Mr. Round has shown, Feudal England 69-82, that the carucates were imposed upon the vills in multiples of six.

[2] E.H.R. xi 222 a case is cited where the clerk had noticed a large discrepancy between teams and plough lands; Vinogradoff, Manor 157.

[3] Above 64 n. 8.

[4] Domesday Book and Beyond 384, 385; Round, Feudal England 108; both the rod and the acre varied immensely in different localities, Domesday Book and Beyond 374, 375, 395 n. 1; there is a similar variation in the number of virgates in the hide, E.H.R. xi 219; Ramsey Cart. (R.S.) no. 205, at Haliwelle 30 acres = 1 virgate, and 4 virgates = 1 hide; no. 205 at Broughton 32 acres = 1 virgate, and 6½ virgates = 1 hide; no. 207 at Abbott's Ripton 20 acres = 1 virgate, and 4 virgates = 1 hide; no. 204 at St. Ives 16 acres = 1 virgate, and 5 virgates = 1 hide; in the last case attention is called to this by a marginal note.

[5] Round, Feudal England 35, 36; cp. E.H.R. xxvii 20-24 for an account of these land measures in Yorkshire.

[6] Domesday Book and Beyond 397; E.H.R. xi 220.

which answered to the hide or carucate was the "sulung," a tract of about 160 acres.[1] It was divided into four yolks, and each yolk into four parts called virgates—the term "virgate" being used in its general sense of one-fourth.[2]

Such, then, were the modes of cultivation and land measurement which we find in this period. We must now turn to the consideration of the kinds of land ownership recognized in Anglo-Saxon law.

(ii) The kinds of land ownership.

It is generally said that there are three kinds of land ownership known to Anglo-Saxon law. A man may own either Folkland, Bookland, or Lænland.

Folkland.[3]

Allen in his treatise on the Prerogative originated the theory that folkland meant *ager publicus;* and that interpretation was generally accepted until 1893. Sir Paul Vinogradoff in that year proved that the term meant land held by private persons according to the folk or customary law, thus restoring the interpretation of Spelman, who wrote in the eighteenth century. As a matter of fact the term itself is only used three times—twice in charters and once in one of Edward's laws.[4] In none of these passages does the sense demand that we should interpret it as *ager publicus;* and in fact this interpretation raised more difficulties than it solved. Thus, Edward's law speaks as if bookland and folkland were an exhaustive classification of land. But it is quite clear that there was much private property in land which was not bookland because it was not held by book. To meet this difficulty various writers had coined fanciful terms to describe this species of private property. The ethel, the alod, family land, yrfe-land were some of the terms invented to meet the supposed difficulty. Their necessity, together with the difficulty which caused it, disappears if we take the view that this private property in land other than bookland is simply folkland. As Sir Paul Vinogradoff puts it, "The folkland is what our scholars

[1] E.H.R. xi 222 n. 44; Ballard, Domesday Inquest 42. Sir Paul Vinogradoff thinks it was larger—a tract of from 180 to 200 or 240 acres; that it was, in fact, "a provincial standard derived from a provincial local unit of long standing," English Society 147.

[2] Domesday Book and Beyond 395; Round, Feudal England 108.

[3] E.H.R. viii 1-17; Domesday Book and Beyond 244-258; P. and M. i 38, 39; Pollock, Land Laws App. note B; Vinogradoff, Manor 142, 143.

[4] Birch, C.S. nos. 496 and 558; Laws of King Edward (Thorpe i 161) § 2, "Also we have ordained of what he were worthy who denied justice to another, either in bocland or in folcland, and that he should give him a term respecting the folcland when he should do him justice before the reeve. But if he had no right either to the bocland or to the folcland, that he who denied the right should be liable in xxx shillings to the king."

have called ethel and alod and family land and yrfe-land; it is land held under the old restrictive common law, the law which keeps land in families, as contrasted with land which is held under a book, under a privilegium, modelled on Roman precedents, expressed in Latin words, armed with ecclesiastical sanctions, and making for free alienation and individualism."[1] Folkland, then, is the land held by individuals who form part of a village community, who cultivate the land in common, whose rights in the land are bounded and defined by the custom of the community. It is probable that the owners of folkland are most nearly represented, at the later part of this period, by the geneats and the gafolgelders. They are the ancestors of the free men holding freely and the sokemen of the Domesday survey.[2]

Bookland.[3]

Bookland is the great contrast to folkland. Land held by Book-right differs essentially from land held by Folk-right. The book is the law to which the land is subject. To the book and not to the old customary law we must look if we wish to determine what the later lawyers would have called the incidents of tenure. The book is, as we have seen, of ecclesiastical origin.[4] The earliest grants by book are generally grants by the king to the church. Bede, in a famous letter to Egbert, Bishop of York, confirms the impression which we gather from the early books. Kings, in the hope of saving their souls, made reckless and indiscriminate grants to churches and monasteries. These bodies in many cases maintained a crowd of persons who took orders because they desired to lead an idle life free from all duties to the state.[5] The result was that there was no land left to found bishoprics, or to reward the sons of the nobility, or old soldiers, or others who had deserved well of the state.[6] We see in Bede's

[1] E.H.R. viii 11. [2] Chadwick, op. cit. 85-87.

[3] See vol. iii App. III. (1) for a grant of Bookland. [4] Above 24.

[5] H. and S. iii 314-325. There are many priests who do not know Latin. There are some bishops whose companions are not men of decent life, "sed potius illos qui risui, jocis, fabulis, commessationibus et ebrietatibus ceterisque vitæ remissioris illecebris subigantur, et qui magis quotidie ventrem dapibus quam mentem sacrificiis cœlestibus pascent," ibid at p. 315; for an estimate of the amount of land owned by the church in 1066 see Ballard, Domesday Inquest 88, 89.

[6] H. and S. iii at pp. 319, 320, 321, "Novimus quia per incuriam regum præcedentium donationesque stultissimas factum est, ut non facile locus vacans ubi sedes Episcopalis nova fieri debeat inveniri valeat . . . ut omnino desit locus ubi filii nobilium aut emeritorum militum possessionem accipere potest. . . . Sic per annos circa triginta hoc est ex quo Alfrid rex humanis rebus ablatus est provincia nostra vesano illo errore dementata est ut nullus pene ex inde præfectorum extiterit qui non hujus modi sibi monasterium in diebus suæ præfecturæ comparaverit." For another reading of this epistle see Chadwick, op cit. 367-372; he holds that these were grants, not of bookland, but of the king's folkland, and that they were not hereditary.

letter many of the reasons which will give rise at a later period to legislation against grants "in mortmain."

What the king so lavishly granted was often not a bare tract of land, but *mansiones, villæ, vici, manentes.* The growing organization of the state taught the king that he had various rights over the land occupied by others—rights to tax, to feorm, to military service, to jurisdiction—with the result that it is not land only, but also these various royal rights which are granted by book.[1] Hence the same tract of land may be at once folkland and bookland, according as we look at it from the point of view of the cultivator or of the grantee by book, just as at the present day the same tract of land may be leasehold or freehold according as we regard it from the point of view of the tenant or the landlord. The rights of the grantee will depend partly upon the book, partly upon the rights of those who are actually cultivating the soil so granted.

Bookland never lost all trace of its ecclesiastical origin. In the tenth century we find many cases in which the king books land to his thegns; but there is usually a pious preamble and a final condemnatory clause directed against those who dispute the gift.[2] Before the tenth century there are cases in which grants are recited to have been made for the health of the grantor's soul, though in fact the arrangement was a purely business transaction.[3] Even where the book deals only with the pasturage for twelve flocks of pigs it begins "in nomine Dei summi," and proceeds to state in a pompous preamble the desirability of plain statements in writing in order to counteract the designs of wicked men who attempt to overthrow ancient right.[4] The preamble is perhaps becoming common form—like the allegations in the old bills in Chancery.[5] It may have been deemed logically necessary "in order to lead up to the anathema and the cross."[6] Perhaps it was practically useful in securing the sanction of the church to its terms—more especially to the term which conferred testamentary power.

[1] Domesday Book and Beyond, Essay ii § 1; vol. i 19-21.

[2] Thus in a grant by Edgar of A.D. 968 (Birch, C.S. no. 1227) the preamble begins with the creation of the world—"Omnium conditor creaturarum, cum in constitutione vergentis mundi cuncta creasset ex nichilo, ceptamque sui operis perfectionem sexto die complesset, adjuncto sanctæ Trinitatis vocabulo inquit, faciamus hominem ad imaginem nostram," etc. The land is then granted "pro suo fideli servitio."

[3] Birch, C.S. no. 137 (A.D. 716-717) Ethelbald of Mercia grants saltworks to the monastery of Worcester by way of exchange. The grant is stated to be "pro redemptione animæ meæ;" but it closes with the words, "hanc mutuam vicissitudinem idcirco fecisse nos constat, quia utrisque nobis aptum esse visum est."

[4] Ibid no. 175; ibid no. 1229, "In nomine domini nostri Jesu Christi. Omnis quidem larga munificentia regum testamento litterarum roboranda est ne posteritatis successio ignorans in malignitatis fribolum infeliciter corruat."

[5] Vol. i 406. [6] Domesday Book and Beyond 243.

It would be a mistake to think that the practice of booking land ever became common. It was confined almost entirely to the crown; and the land was generally booked to the great and powerful.[1] The book often added to their rights as landowners many of the powers of the state.

Lænland.[2]

The læn or loan of land answered to the *beneficium* of the continent. It was a temporary loan or gift for one or more lives. Three lives is a very general term. Possibly the English church had adopted the rule of Justinian's law which forbade the leasing of church lands for a longer period.[3] The grantee may or may not be bound to perform services in return for the loan. He may be bound to pay rent; or the loan may be given in return for a lump sum.

Some of these loans may have been made to the cultivators of the soil; but of these we have no instances, probably because loans of that kind were not put into writing. The specimens of loans which have come down to us are loans to a superior class. They are as a rule loans from the church to great men, and sometimes even to the king.[4] In fact, just as it is the king who usually makes books, so it is the church which usually makes loans, sometimes to great men, but more often to persons who can serve it—to its thegns or cnihts. In Domesday Book we find many tenants holding "thegnland" of the church which they could not sell without licence.[5]

Of one case in which these loans were made by the church we have an account in a letter which Oswald, Bishop of Worcester, wrote to King Edgar.[6] We gather from the letter that all the terms of the loan did not necessarily appear in the written document. Many of Bishop Oswald's loans have come down to us; but hardly a word is said in them of the terms under which his tenants held. According to the letter to King Edgar the tenants must ride on his business, pay all church dues, supply his needs, repair the church, build bridges, obey his commands, fulfil the service due from him to the king, surrender their land at the expiration of their term.[7] If they failed in their duties they must

[1] Domesday Book and Beyond 315, 316.

[2] See vol. iii App. III. (2) for a specimen of a læn. See generally Vinogradoff, English Society 229-232.

[3] Domesday Book and Beyond 303 n. 3; at the Council of Celchyth (A.D. 816) bishops and abbots were forbidden to lease for more than one life, H. and S. iii 582.

[4] Domesday Book and Beyond 302; the church sometimes asked to be protected from these requests, H. and S. iii 572. Cp. the corody of later law, vol. iii 152-153.

[5] Ballard, Domesday Inquest 129, 130, and references there cited.

[6] Birch, C.S. no. 1136, iii. 382.

[7] "Omnis equitandi lex ab eis impleatur quæ ad equites pertinet, et ut pleniter persolvant omnia quæ ad jus ipsius ecclesiæ juste competunt. . . . Super hæc etiam ad omnis industriæ episcopi indigentiam semetipsos presto impendant. . . . Ad totum

either make amends or forfeit their land.[1] Though this letter is valuable as showing what might be the consequences of a loan, it would of course be wrong to draw from it sweeping conclusions as to the usual terms of such transactions. All landlords may not have been so prudent as Bishop Oswald. The lessees of the church seem sometimes to have been able to commend themselves to what lord they pleased;[2] and the description of "Oswald's law" in Domesday Book[3] shows that it holds an exceptional position—a position which would be the very natural result of the policy pursued by the bishop.

What then was the relation of bookland to lænland? Both were in a sense bookland because they were held by virtue of a writing which fixed the terms of the transaction. Maitland thinks that the relation of bookland to lænland was somewhat similar to the relation in later law of land held in capite to land held by mesne tenure.[4] It would appear from the laws[5] that the holder of bookland stood in a specially close relation to the king. If payments were due from him, if the land was forfeit, the payments were made, or the land went to the king; whereas in the case of lænland the payments were made, or the land went to the grantor.[6] The læn is in fact the more modern instrument used by the greater landowners in imitation of the royal book; and the book itself is being used for a greater variety of purposes than in earlier law. Thus it was natural that there should be some confusion between bookland and lænland. "Books were formerly used only for one purpose, they are beginning to be used for many purposes, and consequently bookland may mean one thing in one context, another in another."[7]

In these three different kinds of land ownership known to the Anglo-Saxons we may see stages in the history of the Anglo-Saxon conception of landowning. We can see that the rights of landowners are beginning in many cases to be rather the rights of tenants than of absolute owners. Even the independent freemen were under the soke or jurisdiction of the king; and their soke might be granted to another.[8] At the end of the period we are beginning to see not so much ownership as tenure.

piramiticum opus ecclesiæ calcis . . . atque ad pontis edificium . . . ultro inveniantur parati. . . . Ad multas alias indigentiæ causas quibus opus est domino antistiti . . . sive ad suum servitium sive ad regale explendum."

[1] "Ast si quid præfatorum delicti prævaricantis causa defuerit virum, prævaricationis delictum secundum quod præsulis jus est emendet, aut illo quod antea potitus est dono et terra careat."

[2] D.B. i 72, "Toti emit eam T.R.E. de ecclesia Malmesbriensi ad ætatem trium hominum, et infra hoc terminum potuit ire cum ea ad quem vellet dominum."

[3] Ibid i 172b. [4] Domesday Book and Beyond 314.

[5] Ethelred i 14; Cnut (Secular) 13, 78.

[6] Kemble, C.D. no. 328, cited Domesday Book and Beyond 314 n. 7.

[7] Ibid 316, 317. [8] Vol. i 19, 20.

(iii) The incidents of land ownership.

Folkland represents the primitive form of land ownership. In many parts of England the cultivators of the soil were subject to no landlord. They were bound only by the law of the folk. Their lands owed the trinoda necessitas; they must be cultivated in the customary way; they descended to their heirs. Their owners were free men. There were free village communities in the reign of Edward the Confessor;[1] and there were free men who could go with their land to what lord they would.[2] In other parts of England—in the south and west as contrasted with the east and north[3]—there may, as we have seen, have been communities which had always known a lord. The folk law which applied to their land differed from the folk law which applied to the lordless communities.

With the growth of the extent and pretensions of the state, and with the growth of feudal conditions, other ideas of land ownership arise. The book which makes the religious house the immediate political superior of the cultivator, the varied causes which induce the cultivator to commend himself, and to give or pledge his land to the great man, all tend to put the grantee by book into the position of a landlord.[4] As early as the laws of Ine we can see that there are men holding land under others.[5] The cultivator of the soil occupies his holding upon the terms of doing so many days' ploughing or reaping upon his lord's land, or furnishing his lord with a fixed quantity of provisions.[6] Thus we see the causes at work which will convert the village community into a manor—into an estate grouped round a hall and a demesne farm and cultivated by the lord as an agrarian and economic whole.[7]

But in spite of the condition of dependence to which many of the free cultivators of the soil are and will be reduced under the manorial organization we shall still be able to see the village

[1] Domesday Book and Beyond 141, 142; Vinogradoff, English Society 396, 397.

[2] D.B. i 6, 30b, 31. In a manor belonging to Bishop Stigand, there were six socmen, five of whom could sell their land, but not the soc, the sixth "socam suam cum terra vendere poterat," i 142b. Sometimes these free tenants were newly created, i 30b, "Quidam Edric qui hoc manerium tenuit dedit ii hidas filiabus suis et potuerunt ire quo voluerunt cum terris suis."

[3] Above 63. [4] Vol. i 19-24. [5] Ine §§ 67, 68.

[6] Rectitudines Singularum Personarum, Thorpe i 432. For the manner in which lords levied varied quantities of provisions from their lands see Ine § 70, and Domesday Book and Beyond 237. In the case of St. Paul's the system is found in force in 1085. Probably, whenever a manor is described in the Exchequer Domesday as "de victu monachorum," the term implies that the manor was in an especial manner a purveyor of food to the monastery, Domesday of St. Paul's (C.S.) xxxviii, xxxix.

[7] Vol. i 23-24; Vinogradoff, Manor 225; English Society 340, 471, 472. The "demesne" of the Norman period practically corresponds to the Saxon "inland," ibid 226.

community beneath that organization. Lands will still be described by reference to their situation in the vill.[1] The lord's demesne will still be in strips in the common fields;[2] it will still be subject to the common course of cultivation;[3] and he will have no power to encroach upon the rights of common existing within the community.[4] In many cases the owners of small pieces of folkland will become the humbler tenants of the manor —the villeins and copyholders of later law; but some of the larger owners will become the freeholders—the free socage tenants of later law. Just as the classes who cultivate the soil in this period shade off into one another, so, in the next period, we shall see that the line between the incidents of villein tenure and the incidents of free socage tenure is sometimes fine.[5] In spite of the sharp lines which the Norman lawyers drew across the blurred varieties of the Anglo-Saxon classes of society and modes of landowning, we can see that it is a cultivating community which is the essence of the manor.

I have said that the common-field system is a system of landowning which is intermediate between the older ideas which hardly admit of private property and the modern conceptions of separate and individual property. In the organization of the manor we shall see the transition stage between the common-field system and the modern ideas. The position of the lord, if it did not introduce, at least furthered the idea of the expediency of separate and individual holdings. As I have said, we have hardly yet reached the point when we can argue as to the amount of communalism or the amount of individualism which there is in the land law. In the Middle Ages, as we shall see, we shall be able to argue for the predominance now of one, now of the other, according as we turn our eyes to the common fields, or to the lord of the manor and to those free tenants whose rights are defined by rigid legal doctrines of a strong central court. The development of legal conceptions means a precision in definition and a hardness of outline which make for individualism.[6] But, as we have seen, the older ideas were so strong that a number of quite modern statutes have been needed to adjust agrarian facts to the individualistic point of view from which the law has long regarded those who have rights in the land.[7]

It is in the greater landowners who hold by book or læn—

[1] Vol. i 180 n. 2. [2] Below 376. [3] Ibid. [4] Below 377 n. 10; vol. iii 147-149.
[5] Below 260; vol. iii 31-33. [6] Maine, Early Institutions 390.
[7] Above 60-61; the contrast between the old customs and the individualistic point of view of the common law is well illustrated by the statement made by the Doctor and Student, Bk. i c. 8, that "the land of every man is in the law enclosed from other, though it lie in the open field. And therefore if a man do trespass therein the writ shall be *Quare clausum fregit*."

the future lords of manors—that we can see not only the beginnings of individualistic ownership of the land, but also the germs of the idea of tenure. The grantees by book stand, as we have seen, in close relation to the crown. They are, in fact, a class of great tenants-in-chief. Under them the cultivators of the soil occupy their holdings. The rise of lænland interposed another class between the great man and the peasant. Between the peasant and the crown there might be the thegn who holds lænland of the church and the church to whom it has been booked by the king. In many cases we can see the germs of what will be in later law the various classes of tenure. The land booked to the church for the salvation of the donor's soul was an out-and-out gift; no services were reserved. But the donor will expect the donee to remember him in his prayers. This is not unlike tenure by frank-almoin.[1] If the king books land to a thegn, he books it in consideration of past faithful services, probably of a military sort; but he will sometimes stipulate for continued faithful service;[2] and the amount of military service required is sometimes specified.[3] All free men are obliged to serve in the fryd; but this liability to serve in the fryd is coming to be attached to certain definite tracts of land—to certain five-hide units;[4] and if a man holding bookland neglects the fryd, he forfeits his bookland.[5] On the other hand, if a man falls fighting "before his lord," the heriot will be forgiven.[6] We have here various elements which may develop into tenure by military service. Again, if we look at the numerous and varied services which Bishop Oswald's lessees were obliged to perform, we can see the germs not only of military and socage tenure, but also of tenure by serjeanty and even of villein tenure;[7] and the list of socage tenants will be swelled by those freemen who, in spite of all changes, still hold their land freely and have liberty to go with their land to what lord they will. In the varied services of the humbler cultivators of the soil we can see, as I have said, the germs of villein tenure.

With the conditions which were causing the growth of a doctrine of tenures we see signs of the growth of many of the later incidents and doctrines relating to tenure.

[1] H. and S. iii 515. "Ego Oswulf dux pro perpetua redemptione ac salute animæ meæ meique conjugis . . . hanc prædictam mariscam dabo et concedo ad illam ecclesiam . . . perpetualiter habendum et feliciter perfruendum; hac vero conditione interposita ut unicuique anno . . . ab illa familia . . . celebratur quamdiu fides catholica in gente Anglorum perseverit; cum jejunio divinisque orationibus," etc.; for this tenure see vol. iii 34-37.

[2] See instances cited in Domesday Book and Beyond 294. [3] H. and S. iii 556.

[4] Round, Feudal England 67-69. Cp. D.B. i 56b (Customs of Berkshire), below 169.

[5] Cnut (Secular) 78; D.B. i 56b (Customs of Berkshire). [6] Cnut (Secular) 79.

[7] Above 70-71; for these tenures see vol. iii 37-54, 198-213.

There is some evidence that a gift by book was a gift only to the particular donee, unless the book stated expressly that it should go to his heirs. Similarly, unless the book gave rights to alienate inter vivos or by will, it is by no means certain that the donee possessed these powers.[1] Such rules represent the influence of the lord's interest. To obtain these rights—more especially the right of testamentary disposition—the thegn will make a present to the king.[2] This present is apt to become confused with the heriot—the return to the king or other lord of the arms or stock which he has provided.[3] Often, after the determination of a lease for three lives, the landlord finds it difficult to resume possession.[4] He may be willing to compromise his claims. All or some of these ideas underlie the relief of later law. Maitland has shown that Bishop Oswald is interested in the marriages of his tenants. In one case it is provided that the widow of a tenant shall only have the land if she marries another tenant of the bishop.[5] Similarly we can see that the lord is beginning to be interested in the wardship of the infant heirs of his tenants.[6] Again, if the holder of bookland commits grave crimes, if he neglects the fryd, he forfeits his land to the crown. On the other hand, a man who makes a læn will often stipulate that no act of the grantee shall prevent the land from reverting to the grantor.[7] We seem to see here the germs of three perfectly distinct doctrines of later law—the forfeiture, the escheat, and the reversion.

The conditions precedent for the growth of doctrines as to tenures and as to certain of their incidents are present: but the doctrines are not as yet formulated. Land is still owned subject to various conditions. The "franc alleu" is still known to English law.[8]

[1] Domesday Book and Beyond 297. [2] Below 96.

[3] Cnut (Secular) 71, 72.

[4] Domesday Book and Beyond 310; D.B. i 5b, "Hoc manerium fuit et est de episcopatu Rofensi (Rochester). Sed Godwinus comes T.R.E. emit illud de duobus hominibus qui eum tenebant de episcopo et eo ignorante facta est ea venditio." The council of Celchyth ordained that churches should carefully keep their books that they might be able to prove their titles, H. and S. iii 582; Freeman, Norman Conquest v 782 n. G.

[5] Domesday Book and Beyond 310.

[6] In D.B. i 173 (cited Domesday Book and Beyond 310) it is said that a successor of Bishop Oswald gave the heiress of one of his tenants to one of his knights.

[7] Domesday Book and Beyond 314, 315.

[8] Vinogradoff, English Society 236-238; Esmein, Histoire du droit Français 249-253. The "franc alleu" was land freely and absolutely owned, not held—"une véritable anomalie dans la société féodale." But for the Norman Conquest there would probably have been much of such property in England; even in the thirteenth century men held land for which they could not show a charter, "de antiquo conquestu," "per antiquam tenuram," see instances cited Vinogradoff, Villeinage App. xii 453; and cp. Extenta Manerii of 1275, Statutes (R.C.) i 242.

In the Anglo-Saxon land law we hear little or nothing of any doctrines as to ownership or possession. The growth of the more individualistic forms of landowning implied in the book and læn will tend to give rise to such doctrines; but, as yet, the land is for the most part owned and cultivated according to a customary routine which prevented many of those disputes between individual owners, the existence of which is a condition precedent to their growth. It is to the law of movable property that we must look for some of the roots of the later legal doctrines upon this topic.[1] When rules as to the ownership or possession of land became necessary, the principles applicable to movables were, with some modifications, applied to land. Instances are the rules as to vouching to warranty;[2] and the rules as to the effect of possession for three or four days, which appear in the law as to stolen cattle long before they are applied to land.[3] The application of these rules to land was, as we shall see, shaped by forms of action which differed from the forms of action which were used for movables; but, in spite of the differences which resulted, fundamental principles, which can be traced back to this period, have dominated and still dominate the common law doctrines about the ownership and possession of both land and movables.[4]

It is perhaps hardly necessary to say that we have as yet no doctrine of estates.[5] The man who has granted a læn for three lives may be able to recover it when all the lives fail. His interest is hardly definite enough to be capable of precise legal definition. It is not until doctrines of tenure and possession have been elaborated by a strong court that we get the rise of the peculiarly English doctrine of estates in the land. We merely see one remote element in the later doctrine—the tendency to make the status of persons depend upon their interest in the land.[6]

(iv) Conveyance.

Of the forms of conveyance of land other than bookland we know hardly anything. It is probable that symbolic methods of transfer by means of rods, turves, or knives were often used, just as they were used in later law, to give livery of seisin.[7] It is probable that, to perpetuate evidence of the transfer, they were sometimes made or declared to have been made in court. We have an account in 1038 of a suit in which a verbal convey-

[1] Below 78-80; vol. iii 89-91. [2] Below 79, 112-114.
[3] Below 263; Maitland, Collected Papers i 421-422; L.Q.R. iv 32.
[4] Below 353; vol. iii 352-354. [5] Below 350-352. [6] Above 40.
[7] Madox, Form. Angl. Introd. i, ix, x; P. and M. ii 86; vol. iii 222.

ance was declared in the gemot.[1] When the court is held by a lord, when the smaller landowners have, for various causes, become dependent upon a lord, the lord will perhaps exact a fee when this course is pursued. The transfer of a rod is an ancient symbolic method of transfer. It has no necessary relation to any lord;[2] but if the rod passes through the hands of the lord or his presiding deputy we are not far from the copyhold conveyance of later law.[3]

In the case of bookland it is possible that the signing and delivery or the transfer of the book was all that was needed to complete the conveyance.[4] Bookland was a Roman institution, and the Roman law, from which the book was derived, appeared to admit of the transfer of land by written instruments.[5] The execution of the book or its transfer might operate as a conveyance, as a settlement, or as a will. And the form of these books tended to become stereotyped; for, as Mr. Stevenson has pointed out,[6] though the Anglo-Saxon kings "did not possess an organization known as a Chancery—they must have had the thing." From the time of Athelstan at least they had an "elaborate system of formulæ," while, "from the time of Edmund there were in more or less continual use certain sets of formulæ for the various parts of a charter."[7] We shall see that these charters are one of the roots from which spring the mediæval deeds which evidence a feoffment.[8] But, even in this period, these books are not the only forms of writing used to convey property. The king at this period used to communicate his pleasure to persons and courts, such as the shire moot, by writs.[9] By these writs many things could be ordered. There might be a direction to invest a bishop with the rights of his see, to compromise a suit, or to give possession of property.[10] It was because the writ was so adaptable that, in the following period, it developed into many different instruments—charters, letters patent, letters close, and the ordinary judicial writ.[11] We shall see that in the following period the writ charter was destined to supersede the older form of grant by book.[12]

[1] Essays in Anglo-Saxon Law, App. no. 28; Kemble, C.D. no. 775.

[2] Vinogradoff, Villeinage 372-374, connects it, not with the lord's assumed ownership, but with the Frankish custom of transferring property by a rod through the agency of the Salman (for the Salman see vol. iii 563-565). This seems to be borne out by the custom of Yetminster Prime, cited Elton, Custom and Tenant Right, App. C; assignments there usually took place before the reeve and two or more of the tenants; but, if they could not be had, then before sufficient witnesses; in either case a straw was surrendered.

[3] Domesday Book and Beyond 323.

[4] Essays in Anglo-Saxon Law 110; App. nos. 5, 6, 9, 13, 15, 17, 18, 23, 25, 27.

[5] Madox, Form. Angl. i; P. and M. ii 88. [6] E.H.R. xi 731.

[7] Ibid. [8] Vol. iii 225-226. [9] E.H.R. xxvii 5. [10] Ibid.

[11] Ibid. [12] Vol. iii 226.

Perhaps in the accounts of compromised or decided lawsuits we can see the germ of what will become, when the courts begin to keep records, the fine and recovery of later law.[1] But courts do not as yet keep records. These records are made by private persons for the same reason as books are drawn up—in order to "perpetuate testimony."[2]

What I have said as to the jurisdiction of the Anglo-Saxon courts[3] is true as to the Anglo-Saxon system of landowning. We see a confused mass of institutions and ideas old and new. We see the village community with its primitive mode of cultivation. We see, among the wealthier classes, new forms of land ownership created by the Book, and, later, by the Læn. We see the village community in many places gradually becoming dependent upon a lord, and developing into a manor—an estate cultivated by the old methods, but organized by, and held of, the lord. Both among the higher classes and the lower, landowning is tending to become land holding. We can see the germs of many of the later tenures, and of many of the incidents of those tenures. We have, in fact, the materials from which a strong court might construct a land law. But as yet the materials are very raw. It is only by looking back at them from the point of view of later times that we can see that they are indeed the materials which have gone to the making of the most unique branch of the common law—the law of Real Property.

Movable Property

I shall deal with movable property under two heads—(i) Ownership and possession, (ii) Contract.

(i) Ownership and Possession.

Early law does not trouble itself with complicated theories as to the nature and meaning of ownership and possession. The law must have been peaceably administered for many years before the materials for such theories are collected. In fact the earliest known use of the word "owner" comes from the year 1340; the earliest known use of the word "ownership" from the year 1583.[4] Normally and regularly the person in possession is the owner. It is such a person that the rules of the oldest part of

[1] Essays in Anglo-Saxon Law, App. nos. 2, 3, 5, 6, 7, 10, 14, 15, 16, 30. In the record of a suit of inheritance decided in 789 at the synod of Celchyth the word "finis" is used: "Tunc Archiepiscopus . . . ita *finem* composuerunt et reconciliaverunt," H. and S. iii 465; cp. ibid 512, 596.

[2] See the clause of the Council of Celchyth as to the keeping of written records of each decision of a synod, "ne imposterum aliquod scrupulum iniquitatis adplicatur," H. and S. iii 583; and cp. the entries in the Ramsey Cart., which show that entries were made after the event with this object, i nos. 68, 72, 81.

[3] Vol. i 3, 4.

[4] P. and M. ii 151, n. 2.

the law—the law as to theft and robbery—are designed to protect. But the smallest degree of civilization will produce the phenomenon of ownership divorced from possession. Owners will lend or deposit or lose their property. The law must lay down some rules as to the rights of owners on the one side, and as to the rights of the bailee or the finder on the other. The rules which our earliest laws lay down on these subjects are, as we might expect, rough and ready. They are adapted to an age in which cattle are the typical species of movable property, in which cattle-lifting is the typical form of theft. The law does not ask questions as to the right to own or as to the method in which the fact of possession has arisen. It is concerned rather with a concrete and a notorious fact—possession and its loss. A is in possession of cattle. He may be the owner, he may be merely a bailee. But if B drives them off, A may reclaim them, and may, in addition, demand that B shall pay the fine for theft. If B wishes to defend himself from the charge of theft he must prove that he came by the cattle honestly—by sale, gift, or bailment—and he must give up the cattle. If he wishes to prove that the cattle are his own he must show by their marks or otherwise that they were reared by himself; or he may, if he can, vouch to warranty, placing the cattle and the liability attached to the cattle in the hands of a third person.[1] The law therefore does not really trouble itself with questions of ownership and possession. It provides rather a means by which some person, who has had things in his possession and has lost them, can recover them. What that person will recover will be cattle—whether it is possession or ownership is too abstract a question for the comprehension of a primitive system of law. Hence we find that ownership as such, possession as such, is not protected; what is remedied is an involuntary loss of possession. The practical result is, to use modern terms, that an owner who has involuntarily lost possession can take proceedings to recover his property, and to recover a penalty for the theft, against anyone into whose possession the thing has been traced. But if he has voluntarily parted with possession—if, for instance, he has bailed his property to another—it is the bailee, and the bailee alone, who can act if the property is lost. In such a case the owner's remedy is against the bailee. "Hand muss Hand wahren"—where I have reposed my trust, there I must seek it—was the rule of the old law; for "mobilia non habent sequelam."[2] The person in possession

[1] P. and M. ii 156; Borough Customs (S.S.) ii lxxv, lxxvi; as to the procedure employed see below 112-114.

[2] Essays in Anglo-Saxon Law, 198-199; Essays A.A.L.H. iii 149 n. 4; P. and M. ii 153-154; Maitland says, ibid ii 171, "No English judge or textwriter hands down to us any such maxim as *Mobilia non habent sequelam*. Nevertheless we can

with the consent of the owner is treated as though he were the owner as regards third persons. The person in possession of a thing which has gone out of its original owner's control without his consent has a title which is defeasible because another title may be asserted which is older and therefore better; and he runs some risk of being charged with theft. Subject to that he is a possessor, and as regards third persons is treated as though he were an owner—"en fait de meubles possession vaut titre."[1] If we discard the requirement of good faith on the part of the acquirer with which this maxim of the French commercial law of the eighteenth century was accompanied,[2] it can be accepted as a true statement of the law of this period. In fact, we shall see that this idea has lived long in our law, and has had a permanent influence on its rules;[3] for, as we shall see, English law has never known a form of action like the *vindicatio* of Roman law, in which "a claim to a specific thing founded on the plaintiff's purely civil right of ownership in an abstract form,"[4] can be made.

The state of the law is not, perhaps, inconvenient in a rude state of society in which cattle were the most important sort of movable property. Cattle lifting can only be dealt with by speedy pursuit. The laws require that all who have lost their cattle should at once give notice, and raise the hue and cry.[5] All the neighbours will then be under a legal duty to follow the trail.[6] Those into whose lands the trail leads must show that it leads out again. All who in any way impede the operations of those following the trail are liable to a penalty.[7] It is clear that

hardly doubt that this is the starting point of our common law;" for some modifications of this strict rule made from the point of view of the interests of commerce see Borough Customs (S.S.) ii, xli.

[1] For this maxim see Brissaud, Histoire du droit Français ii 1214 n. 5.

[2] "We have not here to deal with rules which in the interests of free trade protect that favourite of modern law the *bona fide* purchaser. Neither the positive nor the negative rule pays any heed to good faith or bad faith. If my goods go from me without my will, I can recover them from the hundredth hand, however clean it may be; if they go from me with my will, I have no action against anyone except my bailee," P. and M. ii 154.

[3] Vol. iii 319 seqq. [4] H.L.R. vi. 404.

[5] Edgar (Ordinance of the Hundred) § 2, "If there be present need let it be made known to the hundred man, and let him make it known to the tithing men, and let all go forth to where God may direct them to go."

[6] Athelstan v § 4, "That every man of them who has heard the orders should be aidful to others, as well in tracing as in pursuit, so long as the track is known; and after the track has failed him, that one man be found where there is a large population, as well as from one tithing where a less population is, either to ride or to go . . . thither where most need is;" § 5, "That no search be abandoned either to the north of the march or to the south before every man who has a horse has ridden one riding."

[7] Edmund (Concilium Culintonense) § vi, "Et dictum est de investigatione et quæsitione pecoris furati, ut ad villam pervestigetur, et non sit foristeallum aliquod illi vel aliqua prohibitio itineris vel quæsitionis. Et si vestigium illud de terra illa non possit educi, quæratur ubicunque suspectum fuerit ac dubium. Et si aliquis illic accusetur, adlegiet se sicut ad hoc pertinebit, et reddat captale et regi cxxs. Et si quis refragaverit et resistat, et rectum facere nolit, emendet regi cxxs."

it is only the person who has involuntarily lost possession who can take such measures as these. A remedy such as this would be useless to the bailor—to the owner out of possession. But, from a modern point of view, it may be said that there is some injustice in allowing a person to claim property from any one, to charge any one with theft, and to throw upon that person the onus of proving his title and of disproving his guilt. We shall see, however, that in Anglo-Saxon procedure proof was a benefit rather than a burden;[1] and, apart from procedural rules, the law as to sales and as to warranty will show us that these rules did not press so hardly upon honest possessors as might at first sight appear.

It was the constant aim of the legislator to ensure that all sales were transacted before witnesses.[2] Sometimes it is required that all sales shall take place in a "port."[3] In all hundreds and in all burhs certain official witnesses were appointed whose duty it was to be present at all sales, or at all sales of articles above a certain value. They are sometimes called transaction witnesses. A person who bought secretly ran great risks. Not only might the real owner of the property claim his own, but he might also make a charge of theft against the purchaser. A purchaser who had bought secretly, or even any man who had taken strayed cattle without notification of the fact, might find it hard to disprove this charge. In fact, the law tried in every way to encourage the publicity of dealings with movable property, as it tried in later times to encourage the publicity of conveyance of land. A prudent man would not only himself know the manner in which cattle in his possession had been acquired, he would also take care that his neighbours were informed upon these matters. The laws of Edgar[4] are very severe and very explicit on this point: "He who rides in quest of any cattle, let him declare to his neighbours about what he rides; and when he comes home, let him also declare with whose witness he bought the cattle. But if he, being on any journey, unintentionally make a bargain without having declared it when he rode out, let him declare it when he comes home; and if it be live stock, let him, with the witness of his township, bring it to the common pasture."[5] Failure to comply with this rule for five days entailed forfeiture of the cattle, even

[1] Below 107.

[2] Edward § 1; Athelstan i 10; Edmund (Concilium Culintonense) v; Edgar (Secular) 3-10; Ethelred i 3; Cnut (Secular) 23, 34; Edward the Confessor 38; for a general summary see G. Stone, The Transaction of Sale in Saxon Times, L.Q.R. xxix 323.

[3] Athelstan i 12, "And we have ordained: that no man buy any property out of port over xx pence;" Edgar (Secular) 6, buying or selling is to be in a burh or a wapentake; Borough Customs (S.S.) ii lxxiii-lxxv.

[4] Secular laws §§ 3-10.

[5] §§ 7 and 8.

though the cattle had been bought in "port" or before witnesses.[1] These rules made for great publicity in the lives of our forefathers. We shall see that this fact will help us to understand much in the rules of procedure in force in Anglo-Saxon times. We may note, too, that the habits and the conduct induced by such rules will create a mental atmosphere very favourable to the efficiency of the juries of the following period.

Again, the Anglo-Saxon legislator endeavoured to secure that all men had a warrantor. A person who sold property—either land or movables—was obliged to warrant the title.[2] We shall see that there was much legislation as to the procedure to be followed in this process.[3] If the rules as to buying and selling before witnesses were observed there would be little difficulty in producing the warrantor, and in thus disproving a charge of theft.

(ii) Contract.[4]

We are told by the modern jurist that the essence of a contract is the agreement of wills embodied in mutual promises directed towards some one object; and, as Holmes has said, "to explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense."[5] But to say that agreements and promises have existed in a remote antiquity is one thing; to say that such agreements were enforceable at law—were contracts—is quite another. The power and capacity of early law are taxed to the full by the task of protecting life, limb, and property. The task of enforcing promises involves problems beyond its capacity, and coercive authority beyond its strength.[6] And so we find that there is practically no doctrine of contract in Anglo-Saxon law. Contract is "but an insignificant appurtenance to the law of property." Therefore all that can be attempted is to point to certain roots from some of which the English law of contract will grow in the future.

It is possible to distinguish three of these roots. The first, for want of a better word, I shall call the procedural root; and from it were derived the primitive methods of pledging one's faith by producing sureties, or by giving something as a security. We can discern a second root in that legislation as to sales which has

[1] Edgar (Secular) § 10.

[2] Alfred and Guthrum's Peace § 4 (Thorpe i 155); Edward I, "And I will that every man have his warrantor" (Thorpe i 159); Athelstan i 24.

[3] Below 113-114.

[4] See generally P. and M. ii 182-191; Hazeltine, Contract in Early English Law, Col. Law Rev. x 608; R. L. Henry, Forms of Anglo-Saxon Contracts, Michigan Law Rev. xv 552, 639; Holmes, Common Law 247-256; Esmein, Etudes sur les Contrats dans le très ancien droit Français.

[5] Holmes, Common Law 251.

[6] Esmein, op. cit. 8; P. and M. i. 34, 35; ii 182, 183.

just been described.[1] The third root is the influence of the church.

(i) Procedure dominates early law, so that it is not surprising to find that the earliest transactions of a contractual nature are connected with the law of procedure. One party to legal proceedings promises the other that he will appear in court, that he will prepare his proof, or that he will satisfy judgment;[2] and he provides sureties to guarantee the fulfilment of these promises. Not far removed from this, is the agreement made between two opposing families as to the payment of the wergild, when a member of one family has been murdered by a member of the other—an agreement the making of which was, as we have seen, at first entirely optional to the relations of the murdered man.[3] If they agreed to accept compensation the representatives of the murderer promised the family of the murdered person that they would pay the wergild, and the family promised that the murderer might come and enter into the formal contract to pay the wergild. The parties then met; and the murderer made his promises, giving something as security (*wed*), and naming his sureties (*borh*). The peace was then restored by the mutual promises of the parties.[4] In the law of procedure *wed* and *borh* long continued to be used as securities for the production of a defendant before a court of law; and in the following period, they became part of the common form of those writs to the sheriff in which he was directed "ponere" a defendant "per vadium et salvos pledgios."[5] But it would be a mistake to regard this furnishing of *wed* and *borh* as mere forms, and the arrangements which they sanctioned as merely formal contracts. The *wed* may have become at a very early date an article of trifling value, and its production therefore a mere form.[6] But the furnishing of the sureties was no mere form; it was a substantial sanction. These sureties were bound primarily to the creditor; and it was to the sureties that he looked for the carrying out of the undertaking. The debtor, according to the Lombard law, gave the *wed* to the creditor, who handed it to the surety as the sign and proof of his primary liability.[7] There is thus some ground for the view that the institution of suretyship is the base upon which liability for

[1] Above 81-82.

[2] Col. Law Rev. x 609; cf. Law of Hlothar and Eadric cc. 8-10 (Liebermann i 10) there cited; Mich. Law Rev. xv 554-558.

[3] Above 44-45.

[4] Above 45; Laws of Edward II., Liebermann 142-143; Laws of Athelstan II., ibid 162; Leg. Henr. 76, 80; Col. Law Rev. x 610.

[5] Cf. P. and M. ii 183 n. 2.

[6] Ibid ii 184; Col. Law Rev. x 609.

[7] Esmein, op. cit. 81—"Dare wadiam et eam recipere per fidejussorem;" P. and M. ii 185; Col. Law Rev. x 611, citing Laws of Ine 31, and Laws of Alfred 1 § 8.

the fulfilment of procedural, and eventually other undertakings was founded.[1] Probably these sureties were regarded somewhat in the light of hostages; and English law still retains a trace of this primitive conception in the fact that the bail of our modern criminal law are bound "body for body." As Holmes says, modern books still find it necessary to explain that this undertaking does not now render them liable to the punishment of the principal offender, if the accused is not produced.[2]

When once this process of making an agreement by means of *wed* and *borh* has been acclimatized in the law of procedure, it was easy to extend it to other transactions. We shall see, for instance, that it played a prominent part in the Anglo-Saxon marriage.[3] But, as time went on, the ceremonies tended to become simplified. The debtor was allowed to give himself as surety;[4] and, soon after, the giving of sureties, which had originally been the sanction of the contract, dropped out. The contract was made by giving the *wed;* and, as the *wed* was merely a symbolic something of no value, its gift was a mere form; and thus the contract so made became a formal contract.[5] Naturally, when this stage had been reached, other symbolic forms tended to emerge. Thus among the Lombards persons could promise, or "make their faith," by the gift of a rod, by a hand shake, or by placing their hands in those of the promisee.[6] These formal acts will live long in the law as part of legal ceremonies very distinct from one another, and from the law of contract. Men will, for procedural purposes, long make their faith with the help of rods;[7] and for a still longer period they will convey property by their means.[8] We still shake hands over a

[1] Holmes, Common Law 247-248; Mich. Law Rev. xv 558 seqq.

[2] Common Law 248-250. [3] Below 88.

[4] Col. Law Rev. x 612; cf. Mich. Law Rev. xv 653.

[5] "We find that Ine's laws (Ine 13 pr.) speak of formal contracts (*wed, vadium*) in quite general terms, without referring in the slightest way to the necessity for the promisor to furnish sureties. So too it is striking that, out of nine paragraphs in Alfred's law (Alfred 33), eight treat of contractual promises by formal pledge (*wed*) or by oaths that bind the debtor alone. In this single paragraph there is reference to the exceptional cases where the debtor provides sureties (*borh*) at the time he makes his formal promise by delivery of the *wed*. . . . In more than one place Ethelred's laws speak, in general terms, of promissory oaths and promises of delivery of *wed;* and everyone is exhorted to abide by these formal contracts. Cnut's laws also contain similar provisions," Col. Law Rev. x 612-613.

[6] P. and M. ii 184-187; Esmein, op. cit. 69-76; cf. Dial de Scaccario ii xix.

[7] Hengham, Magna c. 6—the essoiner promises that the principal will warrant the essoin, making his faith upon the rod of the crier of the court, cited P. and M. ii 185, n. 2; for Hengham's Magna see below 323-324.

[8] See Litt. §§ 78, 79. At this early period contract and conveyance are not accurately distinguished; as Esmein says (op. cit. 79), "Comme le contrat, le transfert ne repose au fond que sur un consentement échangé, et si un peuple primitif a trouvé telle forme extérieure propre a attester le consentement sérieux en matière de contrat, il est naturel qu'il la trouve également bonne a révéler la volonté des parties dans les translations de propriété;" cp. the Roman mancipatio and nexum.

bargain ;[1] and in the most solemn ceremony of the feudal land law—the act of homage—the tenant placed his hands within those of his lord.[2]

(ii) We have seen that the transaction of sale was generally guaranteed by witnesses.[3] Sureties no doubt were also employed ;[4] but the legislation which required witnesses tended to make the presence of these witnesses the most important part of the transaction. Such sales, and probably also exchanges and loans, gave rise to enforceable duties. The precise nature of these duties—whether they were purely personal in their character, or whether they gave a lien on the property of the promisor—is not clear.[5] But the formulæ used in the actions to which they give rise [6] clearly point to a personal liability—to the existence of a debt.[7]

In these cases of sales, or other transactions before witnesses, what the witnesses swore to was the transfer of the property. It was the transfer which gave force to the bargain ; and this is the same principle as that which underlay the real contracts of Roman law. But this real principle somewhat easily tends to blend with the formal principle—the gift of a *wed.* Thus, as Maitland points out,[8] what was handed over might be not the thing itself or indeed anything of value, but merely a symbol of it. It could be regarded either as a symbolic handing over of the res or as a form which clinched the bargain. Thus the handing over of the God's penny, or something as earnest, have about them elements both of the "real" and of the "formal" principles.[9] As we have seen, we get similar transfers of property in land in Anglo-Saxon law.[10]

When, in the following period, these transaction witnesses dropped out,[11] the real principle emerged more distinctly. By that time, as we shall see, the common law had set its face against symbolic transfers of property. It required a genuine traditio.[12] So, in the law of contract, it required a genuine traditio as a condition precedent for the bringing of an action of debt.[13]

[1] Cp. Bl. Comm. ii 448. [2] Vol. iii 54. [3] Above 81.
[4] Ethelred i 3 ; cp. Mich. Law Rev. xv 643.
[5] Col. Law Rev. x 614-615. [6] Below 107, 108.
[7] As Professor Hazeltine says, "The study of Anglo-Saxon dooms and tracts leads one to the conclusion that the formal contracts of early English law created a relationship of debt as between the parties," Col. Law Rev. x 614.
[8] "The *Wed* or gage was capable of becoming a symbol ; an object which intrinsically was of trifling value might be given and might serve to bind the contract," P. and M. ii 184.
[9] Esmein, op. cit. 13-15, 24-26 ; Essays in Anglo-Saxon Law 189, 190 ; Borough Customs (S.S.) ii, lxxxii-lxxxiii.
[10] Above 76 ; and see above 77 n. 2.
[11] See Holmes, Common Law 257.
[12] Vol. iii 224-225. [13] Below 265, 366-367 ; vol. iii 420-424.

We shall see that this tended to alter somewhat the nature of the action of debt. It became to be regarded as resting, not so much upon the fact that the defendant had incurred a personal liability, as upon the fact that the plaintiff was demanding something as his own.[1] And, as we shall see, this conception came the more readily to the early common law because it had a comparatively fully developed law of property and a very rudimentary law of contract.

(iii) In the law of contract, as in other branches of the law, the church gave a new meaning to old forms, and introduced wholly new forms and new conceptions. The older folk laws knew the oath;[2] and much use was made of it in procedure.[3] The church enforced oaths of a new model by penance, "and did not nicely distinguish between the assertory and the promissory oath."[4] This led the church, when the system of the Canon Law had become formulated, to extend the idea of an enforceable agreement by assuming wide jurisdiction over breaches of faith.[5] Again, it gave a new meaning and made new applications of the old forms of *wed* and *borh*. A man might give as security his hopes of salvation, or he might take God as his pledge, or place his faith in the hands of some bishop or sheriff to whom he gave coercive powers over him in case faith was not kept.[6] Thus William II. in 1093, when he was in fear of death, promised redress in solemn form—"Spondet in hoc fidem suam et vades inter se et Deum facit episcopos suos, mittens qui hoc votum suum Deo super altare sua vice promittant."[7] But the most important contribution of the church was, as we have seen, the introduction of writing to validate legal acts. No doubt these writings were usually used to convey property; but at this early date it is, as we have seen, hardly possible to distinguish accurately between contract and conveyance. No doubt, among the Anglo-Saxons writing is chiefly used for conveyance; but it is clear that on the Continent it was believed that Roman law gave validity to any written contract;[8] and, as Maitland has said, we must regard the Franks for many purposes as our ancestors. But, even in the form taken by this new written contract, we can trace the influence of some of the old ideas. As Professor Hazeltine has pointed out, the history of the formal written con-

[1] Below 368.
[2] P. and M. ii 187, 188.
[3] Below 105, 106; Esmein, op. cit. 96, 97.
[4] P. and M. ii 188.
[5] Below 305; C. i, x, i 35; C. 13, x de judiciis 2, 1; C. 13 in Sexto 22.
[6] P. and M. ii 188-190; Esmein, op. cit. 96; Laws of Alfred c. 33 (Thorpe i 82) of "God-Borhs;" cp. Mich. Law Rev. xv 645-647; Col. Law Rev. x 615.
[7] Eadmer, Hist. Nov. i 16.
[8] Esmein, op. cit. 16, 17; P. and M. ii 190, n. 4, citing Rosière, Recueil des formules i 152.

tract of the common law "did not begin with the introduction of the seal from the Continent. It began in the far-off misty days of Anglo-Saxon custom, and from those days . . . its history has been unbroken. Transformed from a contract concluded by the delivery of a *wed* to a contract concluded by the delivery of a sealed instrument, the English formal contract has still a vigorous life."[1]

We can see but dimly the elements which will go to the making of some of the later legal ideas upon the subject of agreements and topics related thereto. We see the beginnings of that real element which will colour the actions of debt and detinue. We see, if not in Anglo-Saxon law, at least in contemporary foreign law, the writing which will become the great formal contract of the common law. We see in the God's penny and the Earnest, conceptions which mercantile custom will add to the common law. We see in the wide jurisdiction assumed by the church the germs of that conception of *læsio fidei* which will, in later days, make the ecclesiastical courts formidable rivals to the royal courts. Other formal ceremonies will remain; but they will either cease to be connected with agreements, or, if so connected, they will survive only in popular usage. The small influence of the Roman conceptions of contract on English law will long preserve many of the older ideas in the common law, when they have been almost wholly lost in continental systems of law.[2]

§ 4. Family Law

Under this head I shall consider, marriage and the relation of husband and wife; the law of succession; and, infancy and guardianship.

Marriage and the Relation of Husband and Wife[3]

Among the Anglo-Saxons the primitive marriage appears to consist in a sale of "mund," or rights of protection, by the parents or guardians of a woman to the husband.[4] The term "mund" is a general term which means protection of very varied kinds. We are reminded of the term "manus" in early Roman law. But it was even more general than the term "manus" because,

[1] Col. Law Rev. x 617; cp. Mich. Law Rev. xv 655-656.

[2] Thus Esmein, op. cit., is often able to illustrate the primitive ideas from Blackstone, cp. pp. 23, 26, 164, 212, 213.

[3] See Brissaud, Histoire du droit Français ii. 1640-1655.

[4] Æthelbert § 77, "If a man buy a maiden with cattle, let the bargain stand, if it be without guile; but if there be guile, let him bring her home again, and let his property be restored to him;" Ine § 31; Essays in Anglo-Saxon Law 163, 164.

as we have seen, it extended beyond the sphere of domestic control, and is in fact one of the germs of the later conception of the king's peace.[1] The parents or guardians of a woman were interested in the transfer because, although the woman passed from their mund, they were still under the same obligations and possessed the same rights if wrongs were committed by or against her.[2] Violation of their mund was compensated by a "mund bryce"—a money payment varying in amount with the rank of the woman.[3]

This form of marriage consisted of two parts. Firstly, the agreement by the bridegroom with the parents or guardians of the bride as to the transfer of the mund at a fixed price. This price was called the *weotuma.* On payment of this price the contract was complete.[4] The bridegroom could demand payment of a fine if anyone interfered with his right to his bride.[5] If he receded from the agreement he forfeited the *weotuma* and paid damages.[6] Conversely, if he did not get his bride he could demand a return of the price, and, in addition, a fine of one-third its value.[7] Secondly, the bride must be transferred to the bridegroom.[8] In addition, the bridegroom usually made "the morning gift" to his wife the day after the marriage.[9]

At the latter part of this period these primitive ideas were somewhat modified.[10] The following contracts were entered into between the bridegroom and the relatives of the bride, and their performance was secured by *wed* and *borh:* (1) The husband no longer paid a price to the parent or guardian. He merely promised "that he will keep her according to God's law as a man should his wife." (2) He arranged with the bride's friends and with herself what settlement he would make upon her "if

[1] Above 47. [2] Above 45.

[3] Æthelbert §§ 75, 76, gives the tariff in his day for widows, "For the mund of a widow of the best class, of an eorl's degree, let the bot be 1 shillings; of the second xx shillings; of the third xii shillings; of the fourth vi shillings. If a man carry off a widow not in his own tutelage let the mund be twofold." The sum seems to have been replaced in later law by the wer of the guilty party, Cnut (Secular) 53.

[4] Essays in Anglo-Saxon Law 168.

[5] Æthelbert § 83. [6] Ine § 31.

[7] Pœnitentialis Theodori xii 33, 34, H. and S. iii. 201, "Puellam desponsatam non licet parentibus dare alteri viro, nisi illa omnino resistat . . . illa autem desponsata, si non vult habitare cum illo viro, cui est desponsata, reddatur ei pecunia quam pro ipsa dedit, et tertia pars addatur; si autem ille noluerit, perdat pecuniam quam pro illa dedit."

[8] Essays in Anglo-Saxon Law 167.

[9] Ibid 173, 174; we get the term in the laws of Æthelbert § 81; Brissaud ii 1645-1646.

[10] What follows is based on the form of bethrothal in the laws of Edmund, Thorpe i. 255, 257; and see Col. Law Rev. x 610-611. Sale of a woman is forbidden by Cnut, Secular Laws § 75, "And let no one compel either woman or maiden to him whom she herself mislikes, nor for money sell her; unless he is willing to give anything voluntarily;" Brissaud ii 1642.

she choose his will," and what should be her rights after his death. This settlement—perhaps one of the germs of the later dower[1]—seems to be the result of a change in the conception of the *weotuma*, and a merger of the *weotuma*, in its new form, with the morning gift.[2] The contract was performed by handing the woman over to the bridegroom; and the actual nuptials were celebrated in the presence of the priest. Thus, while the old idea of the transfer of the mund is still retained, the form of marriage has come to consist of an arrangement between the guardians, the bride, and the bridegroom, which partakes of the nature both of the promise to marry and of the marriage settlement; and to this arrangement the later Christian ideas have added the presence of the priest, and the ecclesiastical rules as to prohibited degrees.[3]

It will be obvious that the marriage service of the English church reproduces these old ideas. We see the *wed* in the ring; we see the settlement in the endowment of the bride by the bridegroom with "all his worldly goods;" we see the giving away of the bride by her guardians; and we see the presence of the priest. In fact, the formularies of the English church are far more suited to the marriage of Anglo-Saxon law than to the marriage of our later common law. This will be obvious if we look at the relationship between husband and wife in this period, and at the effects of marriage upon the property of the parties.

The wife was under the control of the husband;[4] but she possessed proprietary capacity. She and her husband acted together in the alienation of their property.[5] She could take a gift from her husband.[6] Her property was not liable for his wrongful acts,[7] nor was his property liable for her wrongful acts.[8] As we have seen, her relations were liable for wrongs committed by her. They might interfere if they considered that she had been wronged; and a copy of the settlement was

[1] Essays in Anglo-Saxon Law 174, "The dower of English common law is derived in an unbroken historical development through the *dos ad ostium ecclesiæ* of Bracton and Glanvil, the Norman *douaire*, and the Frankish *tertia*, from the purchase price or *weotuma* and the *morgengifu* of the heathen Germans."

[2] Brissaud ii 1646.

[3] Theodore's Pœnitential x (Thorpe ii. 20); Egbert, Confessionale § 28 (ibid 153).

[4] Ine § 57, "If a ceorl steal a chattel, and bear it into his dwelling, and it be attached therein; then shall he be guilty for his part, without his wife, for she must obey her lord."

[5] Essays in Anglo-Saxon Law 177, citing Kemble, C.D. no. 177; Vinogradoff, English Society 251-253.

[6] Birch, C.S. no. 1177 (grant by King Edgar).

[7] Ine § 57; Cnut (Secular) 77.

[8] Leg. Henr. 70. 12, "Si mulier homicidium faciat, in eam vel in progeniem vel parentes ejus vindicetur, vel inde componat; non in virum suum, seu clientelam innocentem;" Laws of Edmund (Thorpe i 257) § 7.

sometimes deposited with them.[1] Among the wealthy classes the rights of the wife on the death of the husband were usually settled by agreement. If such settlement was not made the law allowed the wife to take a certain proportion of the husband's property at his death.[2] But she usually forfeited any property she was thus entitled to by settlement or otherwise if she married again within a year of the husband's death.[3] The custom of Kent in later law, and some copyhold customs, bear a strong analogy to these old rules.[4] The husband, in the event of the wife's death, did not succeed as the wife's heir. He kept the morning gift, which was usually given only in the event of the wife's surviving him. The rest of her property went to her heirs.[5]

Divorce seems to have been recognized. It might take place either by mutual consent; or on account of the wife's infidelity or desertion.[6] In the case of infidelity the husband took all the property.[7] Otherwise, the wife, if she retained the custody of the children, took half the property; if she did not, she took the share of a child; if there were no children, she took her morning gift and her own property.[8]

We shall see that there is but little connection between these rules and the rules of the later common law.[9]

The Law of Succession

At the present day we mean by the law of succession the law which regulates the transmission upon death of the property of one individual to one or more individuals. Was there such a law of succession in the Anglo-Saxon period? Did the customs which made up the law of succession of this period deal with succession to and by individuals, or did they aim rather at settling what we may call the equities existing among some organized group of individuals? This is a question in substance the same as that which has been discussed in connection with the law of property. As I have said, primitive legal conceptions are proverbially vague. We cannot lay down any clear rules as to

[1] Essays in Anglo-Saxon Law 178.

[2] Æthelbert § 78.

[3] Cnut (Secular) 74, "And let every widow continue husbandless a twelve month: let her then choose what she herself will; and if she within the space of a year choose a husband, then let her forfeit her 'morgen-gyfu' and all the possessions which she had through the first husband; and let the nearest kinsmen take the land and the possessions that she had before."

[4] P. and M. ii 424.

[5] Essays in Anglo-Saxon Law 179.

[6] Æthelbert § 79; Theodore's Pœnitential xix §§ 18, 20, 23; Thorpe ii. 19; H. and S. iii 200 (xii 12); cp. Brissaud ii 1058-1061.

[7] Cnut (Secular) 54.

[8] Æthelbert §§ 79, 80, 81.

[9] Vol. iii 185-197, 520-533.

what a law of succession meant in this period, partly for lack of evidence, but chiefly because there were no clear ideas upon the subject. On the whole it is probable that, just as individual property was recognized, so was a succession on death to and by individuals. There are groups, but we can recognize no group so permanently organized that the individual is wholly merged in it.[1] There are no agnatic groups, for, as we have seen, maternal relatives bear the blood feud and share the wer. There may be groups who hold so closely together that they can defy the king;[2] but we have seen that the older organization of society based upon kindred was gradually passing away at the end of the period.[3] It is true that groups of kinsmen or of cultivators have duties to one another, and may share with one another some portions of their property. But to say that they formed any thing like a corporate body is to apply a finished legal conception to a savage age. Family or communal ownership in a sense there may have been, but in a sense which is not inconsistent with individual ownership. In Anglo-Saxon times we sometimes see several individuals holding land "in parage."[4] They are probably relatives who have not yet divided the property which has descended to them. The fact that a man is a tenant in common or a shareholder in the common fields with others does not prevent him from being in a sense the individual owner of his undivided share. The dead man's property goes naturally to his nearest kin. "Successores sui cuique liberi et nullum testamentum."[5] A law of succession is not needed till disputes arise. But if, owing to priestly exhortations, men try to defeat the rights of their kin in their lifetime or after their death, rules must be made where none before were needed. These rules will naturally take the shape of what once happened before men were tempted to break through the old accustomed order. Thus we get what have been called "birthrights." The fact that a man's child gets at birth the right to hinder the dissipation of that which in course of time will naturally be his is now put forth as a definite rule. Such rights imply not family ownership, but the need to state and enforce rules once tacitly obeyed. The period of unconscious practice is over. Opposing interests demand a law of succession.

In modern times we divide the law of succession into the law of testamentary and the law of intestate succession. The will in ancient law is the exact opposite of what it becomes in

[1] Cp. P. and M. ii. chap. vi § 1 with Vinogradoff, Manor 139, 140, 210.
[2] Athelstan v 8, 2.
[3] Above 38-40.
[4] Domesday Book and Beyond 145, 146.
[5] Tacitus, Germania c. 20.

later law.[1] It is a species of conveyance, neither secret, ambulatory,[2] nor revocable. It was attempts to make conveyances which brought birthrights prominently into notice—which led to the existence of a law of succession. An instrument which will take effect after death is one of the means by which the rights of children can be defeated; an instrument which takes immediate effect is another. As late as the age of Bracton both are for this reason classed in the same category.[3] In this period it is, as we shall see, difficult to distinguish between them.[4] I shall consider, therefore, (i) the law of intestate succession; (ii) the law defining how much of his property a testator may dispose of after his death; (iii) the forms in which such dispositions may be made; and (iv) the representation of the deceased.

(i) The law of intestate succession.

We can say little of the actual rules in force at this early period. Probably every district had, as it had in later times, its distinct customs. There is some evidence that the Anglo-Saxons knew the primitive and picturesque method of reckoning degrees which compares the pedigree to the human frame, and reckons the degrees by its joints.[5] The parents stand in the head, brothers and sisters in the joint of the neck, first cousins in the shoulder, second, third, fourth, fifth, and sixth cousins in the elbow, the wrist, the first, second, and third joints of the middle finger. At the nail the kinship ends. But even if we had clear evidence that the Anglo-Saxons had adopted this method of reckoning degrees, we could not probably apply it universally to all classes of property.[6] "Early Germanic law," says Maitland, "shows a tendency to allow goods of the deceased to go different ways."[7] Thus chattels will go one way, land another, and one class of land will differ from another class of land. The rule which will prefer the rights of the maternal kin in successions to property which has descended from the mother's side, and the

[1] Maine, Ancient Law 174.

[2] That is, capable of passing all the property of which the testator is possessed at his death, whether or no he possessed it at the time of making his will.

[3] ff. 19b, 20. He there discusses the effect of a condition which he says may be able "impedire descensum ad proprios hæredes contra jus commune." If, for instance, a man about to go abroad says, I grant land to A on condition of its restoration if I return, but if I do not it is to remain to him in fee, this condition "dat exceptionem contra veros hæredes et contra assisam mortis antecessoris."

[4] Below 95-96.

[5] Essays in Anglo-Saxon Law 127, citing Sachsenspiegel i 3 § 3.

[6] Some expressions in the Anglo-Saxon laws show that it was known to them, Ethelred vi 12, "Let it never happen that a Christian man marry within the relationship of vi persons, in his own kin, that is, within the fourth joint" (*cneowe*). In Egbert's Confessionale the Latin *gradus* is translated *cneowe*.

[7] P. and M. ii 257.

rights of the paternal kin in successions to property which has descended from the father's side will make for diversity.[1] We shall see that this rule, "*paterna paternis materna maternis*," was applied in later days to the law of inheritance.[2] It was a widespread rule and probably ancient. It was a natural rule, too, in a society organized upon the basis of assigning definite rights and duties to the paternal and the maternal kin.[3] Similarly one class of chattels will differ from another class of chattels. In the continental codes there is often one rule for a man's armour and another rule for a woman's goods.[4] The growth of new modes of owning property and the growth of feudal conditions helped this tendency to diversity. The rules which apply to bookland will not apply to folkland. A man's kin, paternal or maternal, his lord,[5] and the church which buries him,[6] all claim some part of his property. Even in this age before feudalism the exigencies of agriculture made it undesirable that the shares in the common fields should be too minutely subdivided; and thus alongside the rule of equal division among children we see signs that "rules of primogeniture and junior right were forming themselves on the basis of local custom."[7]

(ii) Of what parts of his property may a testator dispose?

(*a*) As to movable property. We have no evidence that any very definite restrictions were placed upon testators; and the church's influence made for the freedom of testation. We shall see that to die intestate, unless death was sudden, was in later law regarded with horror because it was almost tantamount to dying unconfessed.[8] There are signs that this feeling was not unknown in the latter part of this period.[9] But in spite of this it is clear that testators always show very considerable anxiety as to the chance of their wills being observed. They often give

[1] P. and M. ii 297, 298.

[2] Vol. iii 179-180.

[3] Above 45, 88; the idea is illustrated by a clause in King Alfred's will (Thorpe, Dipl. 491), "My grandfather had bequeathed his lands to the spear side, not to the spindle side; now if I have given to any female hand what he acquired, then let my kinsmen make compensation."

[4] P. and M. ii 257.

[5] Cnut (Secular) 71, 72; Selden, Original of the Ecclesiastical Jurisdiction of Testaments, chap. v.

[6] The parish church which buries him can claim *soulscot*, P. and M. ii 320; in later times this is usually expressly left by will, Test. Ebor. (Surt. Soc.) *passim*; cp. Bracton f. 60, "In quibusdam locis habet ecclesia melius animal de consuetudine, in quibusdam secundum vel tertius melius, et in quibusdam nihil, et ideo observanda est consuetudo loci."

[7] Vinogradoff, Manor 207; English Society 249, 250.

[8] Vol. iii 535-536.

[9] Cnut (Secular) 71, "And if any one depart this life intestate, be it through his neglect, be it through sudden death: then let not the lord draw more from his property than his lawful heriot;" cp. H.L.R. xviii 120 seqq.

presents to the king or their lords that their wills may stand.[1] Selden [2] cites a case in which a testator made three copies of his will. One he kept; another he handed over to the abbot of Ely, the principal beneficiary; the third he gave to the earldorman, asking him to support the dispositions therein contained.[3] There are other instances where this course was adopted.[4] In the twelfth and thirteenth centuries there is found very generally prevailing in England a system which gives one-third to the wife, one-third to the children, and allows the testator to dispose only of the remaining third.[5] Bede tells us a tale which would seem to show that some such system as this was known in the Northumbria of his day. A certain man once died and was restored to life. After his resurrection he divided his property into three parts. One part he gave to his wife, another to his children; the remaining part he retained and distributed to the poor. He then entered Melrose Abbey.[6] Though, possibly, these rules were always the rules observed, we cannot say that there is any definite connecting link in the Anglo-Saxon laws between Bede's date and the twelfth century.[7] But all these facts would seem to show that in the earliest period the limits of the testamentary power were vague, and disappointed relatives might be able to upset an "unduteous" will.[8]

(*b*) As to immovable property. Here we must distinguish between folkland and bookland. Of folkland, as I have said, we know but little. But if a man could dispose of all his folkland by will, whence came those restrictions on alienation in favour of the heir of which we read in the twelfth century?[9] Why do heirs so often join in a consent to the grants made by their fathers in the twelfth century?[10] Of bookland we can speak more definitely. There is considerable evidence to show that a

[1] Thorpe, Dipl. 528, "I Wulfaru pray my dear lord king Ethelred that I may be worthy of my testament;" even the Ætheling Æthelstan (Ethelred II.'s son) gets his father's consent to his will, ibid 562; at p. 576 there is a solemn licence to make a will given by Edward the Confessor to one Tole; cp. ibid 497, 498, 499, 500, 505, 526; H. and S. iii 548, permission given to one Ethelric at a synod at Acle.

[2] Original of the Ecclesiastical Jurisdiction of Testaments, chap. v.

[3] "Petiit ab illo ut suum testamentum stare concederet quod modo abbas illud scripserat et ordinaverat apud Lindware coram prædictorum testimonio virorum."

[4] Thorpe, Dipl. 532 (Wulfgyfu), 565 (Leoflaed).

[5] Glanvil vii 5; vol. iii 550-553.

[6] Eccl. Hist. v. 12, "Omnem quam possederat substantiam in tres divisit portiones, e quibus unam conjugi, alteram filiis tradidit, tertiam sibi ipse retentans statim pauperibus distribuit."

[7] P. and M. ii 347.

[8] Thorpe, Dipl. 466, settlers of property explain their dispositions by saying, "There is no nearer of kin to Æthelmod than Eadwald . . . it is most natural that he have the land, and his children after him." Sometimes (e.g. ibid 479) the will "is settled with the counsels" of the testator's friends.

[9] Vol. iii 73-75.

[10] Ibid. 74 n. 1.

man could freely dispose of it by his will. The heir's consent is not part of the ordinary form. He is only mentioned to be cursed along with all others who dispute the gift.[1] In Alfred's law[2] there is a prohibition of giving such land away from one's kindred—but only if this was specially forbidden by the donor or ancestor. We cannot, as we have seen, generalize from the law relating to such land. The book was of foreign origin, founded on Roman ideas of absolute ownership; and it is from the old restrictions of the customary laws that the land conveyed by book was free.[3]

(iii) The forms in which testamentary dispositions may be made.

In the Anglo-Saxon period we can see the elements from which a will may be developed in later law. But we can see that no accurate technical idea of a will has as yet arisen. Such testamentary dispositions as exist take the following forms:— (1) There is the gift to take effect after death.[4] The land book allows a man to give in his lifetime or after his death to any heir he pleases. Hence we get dispositions which we should call rather settlements than wills.[5] A man may reserve to himself a life interest, and then proceed to regulate in various manners what is to happen to his property upon his death. Such dispositions have only one element of a testamentary character. They define the fate of property after death. Probably they are neither revocable nor ambulatory.[6] (2) There are the dying man's "novissima verba."[7] These are the last words spoken generally to the priest. They may convey to a religious house

[1] P. and M. ii 249 and n. 3.

[2] Alfred § 41, "The man who has bocland, and which his kindred left him, then ordain we that he must not give it from his maegburg, if there be writing or witness that it was forbidden by those men who at first acquired it, and by those who gave it to him, that he should do so."

[3] Above 68.

[4] For the evolution of a similar Germanic institution, the *Vergabung von Todes wegen*, see Goffin, The Testamentary Executor 19-24. The Anglo-Saxons do not seem to have known anything like the Frankish *affatomie* or the adoption of an heir, ibid 16, 17; Lex Sal. § 46.

[5] Thorpe, Dipl. 462—settlement on husband and wife and the survivor and their child; if there is no child the land is to go to Archbishop Wulfred; see also 465, 469, 480.

[6] Ibid 492, 493, "Ceolwin makes known by this writing that she *gives* the land at Alton. . . . She *now* gives it *after her days* to the convent at Winchester;" cp. Wulfgar's will, ibid 495; ibid 518, "Brihtric Grim *gives* the land at Repton to the old Monastery . . . on the condition that he have the usufruct of the land as long as his time may be;" ibid 585.

[7] Dialogue of Egbert § 2, "Presbiter, diaconus, si possint testes fieri verborum novissimorum, quæ a morientibus fuint de rebus suis?" The answer is, "Adsumat etiam secum unum vel duos, ut in ore duorum vel trium testium stet omne verbum; ne forte sub prætextu avariciæ propinqui defunctorum his contradicant, quæ ab ecclesiasticis dicuntur, solo presbitero vel diacono perhibente testimonium;" for an instance from D.B. see English Society 251 and n. 1.

some part of the dying man's property, or they may direct a distribution among his relatives. The church brought all its influence to bear to secure the fulfilment of the desires expressed by the dying man. We have seen that it succeeded.[1] But here again we may doubt how far these last words were revocable or ambulatory. They amounted rather to a death-bed distribution.[2] (3) In the ninth, tenth, and eleventh centuries we get a written instrument (*cwide*) which specifically bequeaths various parts of a man's property.[3] It sometimes appears to be regarded as revocable,[4] and perhaps even ambulatory.[5] But traces of these characteristics are not common; and the only instances which we have of wills of this kind are instances in which the testator is a king, or a man in a very high position. It is clear that to secure their validity the support of the king, the Witan, or the church is needed. The ordinary person must be content with the first form, which will often leave him merely a life interest in his own property, or with the second, which was probably an actual distribution.

(iv) The representation of the deceased.

In the Saxon period there is no law of executors. As in the case of the will, so in the case of the representation of the deceased, we can only see some of the germs which have gone to the making of the representative in later law. The dying man by his "last words" hands over his property to his friends or to the priest; and they will see to the fulfilment of his wishes.[6] The written *cwide* contains requests to the king that he will give effect to its dispositions. Sometimes the testator will appoint guardians of the document,[7] or request a bishop[8] to see to the

[1] Above 93; vol. iii 535-536. [2] P. and M. ii 317; vol. iii 536, 540.

[3] Thorpe, Dipl. 487-492 (King Alfred's will); cp. ibid 500-503, 512-515, 533-539.

[4] King Alfred says in his will, "Now I had previously written in another wise concerning my inheritance . . . and had intrusted the writings to many men . . . but now I have burned those old ones that I could discover. If any of them be found it stands for naught, for I will that it be now thus with the aid of God," Thorpe, Dipl. 490; ibid 599, Bishop Ailmer endeavours to guard against revocation in respect of one bequest, "And however I may alter my bequest I will that this stand;" see vol. iii 540.

[5] King Alfred says in his will, "But I know not for certain whether there is so much money, nor know I if there be more of it, but so I ween. If it be more be it in common to them all to whom I have bequeathed money," Thorpe, Dipl. 490; ibid 539 (Wynflæd's will) after a number of specific bequests it is said, "Then she gave to Æthelflæd all the things that are there unbequeathed, as books and such little things;" cp. ibid 548. But such residuary bequests perhaps show that without them the will has no ambulatory effect.

[6] P. and M. ii 317.

[7] Thorpe, Dipl. 566, "And be Bishop Ælfric, and Topi Prude, and Thrummi guardians of this testament."

[8] Ibid 517, "Now I pray the Bishop Ælfstan that he protect my relict and the things which I leave to her." H. and S. iii 548 (Ethelric's will A.D. 804), "Si aliter fiat, ut non opto, aliquis homo contendat contra libros meos vel hæreditatem

due fulfilment of the directions which it contains. In other cases this seems to be left to the beneficiary himself.[1] Sometimes testators seem to wish to impose upon those who will succeed to their land the obligation of fulfilling their bequests.[2] In one case a testator gives property to his brother in consideration of his "attending to and watching over" the needs of his widow.[3] A law of Cnut[4] provides that the property of a man who dies intestate shall be distributed among his relatives by his lord.

We do not find in the Anglo-Saxon laws any one like the Salman of the continental German codes—the intermediary whose duty it is to deal with the property transferred to him according to the transferor's directions.[5] The existence of such a person affected the conception of the executor in Germany; and he may, in later times, have had some influence upon the growth of the English executor. But at this period a definite representative of the deceased was hardly needed. At a time when the law of contract was in its infancy, all that was needed was a few simple rules touching the distribution of the deceased's property. It is not certain that debts were either actively or passively transmissible. The fact that a testator mentions debts owed to or by him, and gives directions concerning them,[6] may show that such debts could not have been enforced by or against his heirs without this mention.[7] On the other hand we may remember that the liability to warrant the title to a chattel descended on the heir,[8] and that the payment of debts was sometimes regarded as a religious duty to be specially attended to by the dying.[9] Moreover, the fact that a testator forgives debts may show that they might have been enforced by his heirs.[10] But we shall see that it is only partially and gradually that the transmissibility of obligations has been allowed in English law.[11]

Infancy and Guardianship

We have no evidence that the Anglo-Saxons knew any institution at all comparable to the *patria potestas* of Roman law.[12]

indigne, tunc habet Aldwlfus Episcopus in Liccetfelda istius cartulæ comparem, et amici et necessarii mei et fidelissimi alias, id est Eadberht Eadgaring et Æthelhead Esning ad confirmationem hujus rei."

[1] Thorpe, Dipl. 459, 460, Oswulf left land to Christchurch, Canterbury, and Archbishop Wulfred settled a scheme to carry out the testator's directions.

[2] Ibid 479, Ealburh, after making specific bequests, says, "Let whatever men have the land give these things."

[3] Ibid 470. [4] Cnut (Secular) 71. [5] Vol. iii 563-565.

[6] Thorpe, Dipl. 561 (will of the Ætheling Æthelstan), "and of my gold let there be retained for Ælfric at Barton and Godwine Drepla so much as my brother Eadmund knows that I have to pay them."

[7] P. and M. ii 255, 256. [8] Below 113.

[9] Vol. iii 582-583. [10] Thorpe, Dipl. 551. [11] Vol. iii 576 seqq.

[12] Essays in Anglo-Saxon Law 153; P. and M. ii 434.

At the same time it is clear that all through the period the father's power over his children was large. A child born in lawful wedlock and acknowledged by his father was in his father's "mund." We have seen that "mund," with its wide meaning of protection, was the foundation of many rules belonging, according to modern ideas, to distinct departments of law. Possibly the father had the power of life and death over a child who had not tasted food.[1] He could sell his children under seven years of age, but only in cases of absolute necessity.[2] Obviously he had the right of moderate chastisement.[3] He could veto the marriage of a daughter under the age of seventeen;[4] but he could not force a marriage upon his daughter.[5] Possibly he possessed similar rights in the case of a son.[6]

These powers were not indefinitely prolonged. We have no mention in the Anglo-Saxon laws of any form of emancipation such as that described by Tacitus. But the child, by attaining a certain age, became independent. What the age of majority was varied at different periods.[7] It may also have varied for different purposes. For the purposes of the criminal law a boy of twelve was of full age. At the age of fifteen he could become a monk, and could no longer be chastised by his father.[8] We shall see that in later law the period of emancipation from guardianship varied with the tenure of the land held by the infant.[9]

These rules as to the period of majority were probably the same for both males and females. At no period can we say that the Anglo-Saxons knew anything like the *perpetua tutela mulierum.* In earlier days, however, women were always for certain purposes under the protection of their father or their next of kin unless they were married.[10] We have seen that the earliest form of marriage presupposes that the woman is under a guardian;[11] and the guardian represented her be-

[1] Essays in Anglo-Saxon Law 153.

[2] Pœn. Theod. xiii 1 (H. and S. iii 202), "Pater filium suum vii annorum, necessitate compulsus, potestatem habet tradere in servitium; deinde sine voluntate filii, licentiam tradendi non habet."

[3] Excerptiones Egberti c. xcvi, "Parvulus usque annos xv pro delicto corporali disciplina castigetur; post hanc vero ætatem, quicquid deliquerit, vel si furatur, retribuat, seu etiam secundum legem exsolvat."

[4] Pœn. Theod. xii 36 (H. and S. iii 201, 202).

[5] Cnut (Secular) 75.

[6] Essays in Anglo-Saxon Law 153, 154.

[7] Ine § 7 ten years; Athelstan's Ordinances § 1 twelve years; so also Cnut (Secular) 21; at the same age a boy must be brought into hundred and tithing, ibid 20.

[8] Above n. 3.

[9] Vol. iii 510; P. and M. ii 436.

[10] Æthelbert § 76, "If a man carry off a widow not in his own tutelage let the mund be twofold."

[11] Above 88.

fore the courts.[1] These rules seem to have applied to widows as well as to spinsters.[2] But at the end of the Saxon period women seem to have been legally independent.[3]

The Anglo-Saxons had no very definite law of guardianship. The law on this point was in a condition somewhat similar to the law of succession. A child's mother looks after its person. Its paternal kin are responsible for its property.[4] For the rest, the king is the natural protector of those who have no kin.[5] We shall see that in the following period the lord's interest will have an influence upon the law of guardianship as great as that which it will exercise upon the law of succession. It will result in the establishment of an elaborate law of guardianship in the case of infant heirs to land; but in the case of other infants its rules will be scanty.[6]

§ 5. Self-Help

The aim of early bodies of law is to induce men to submit to the decision of a court instead of helping themselves to what they deem to be their rights, or instead of prosecuting the feud against those who have injured them. Early law endeavours, therefore, to limit rigidly the conditions under which the individual may have recourse to self-help. It attempts, not so much to arbitrate between the parties, as to secure the observance of rules which will prevent the individual helping himself without the sanction of the court. The earliest form of procedure known to us—the executive procedure of the Salic law—is little more than a series of rules as to the conditions under which a creditor may help himself to the property of his debtor.[7] There is no

[1] Essays in Anglo-Saxon Law 181, citing Kemble, C.D. no. 685.

[2] Ibid App. nos. 18 and 26 = Kemble, C.D. nos. 499 and 704.

[3] Ibid 113 and the references there cited, "The theory that, in respect to the legal position of women, the Anglo-Saxon conception did not differ in principle from that of the pure Germanic codes of the North is abundantly proved by the books. The charters are full of cases in which women are grantors and grantees, vendors and vendees, plaintiffs and defendants, devisors and devisees, without a variation in the terms of the instrument which could raise a suspicion of difference in sex. In all the law to be drawn from the books, women appear as in every respect equal to men. To women and men are given the same immunities and the same privileges, and on them are laid the same legal and political burdens. A woman was as good a witness and as good a helper in the oath as a man."

[4] Hlothære and Eadric § 6, "If a husband die, wife and child yet living, it is right that the child follow the mother; and let there be sufficient borh given to him from among his paternal kinsmen, to keep his property till he be x years of age;" Ine § 38.

[5] Ethelred ix § 33, "And if any one wrong an ecclesiastic or a foreigner . . . then shall the king be unto him in the place of a kinsman and of a protector, unless he else have another;" Cnut (Secular) § 40; Leg. Henr. 10. 3; 75. 7.

[6] Vol. iii 512-513, 516, 520.

[7] Sohm, Procedure of the Salic Law (tr. Thevenin) § 3.

attempt to deal with the merits of the case; nor could such an attempt have been made; for it is a characteristic feature of the procedural rules in this early period of legal history that they are not under the control of the court.[1] They are rigid rules which the parties must follow precisely at their peril. Any mistake is fatal to the case of the party who makes it; and we shall see that this characteristic long continued to be a marked feature of the procedure of the common law.[2]

But, though early law can thus set conditions for the exercise of the right of self-help, no body of law can altogether repress it—nor, if it was able, would it be desirable to do so. If the individual can be allowed to help himself quietly to his rights without disturbing the general public, if as a rule the individual does not try to help himself unless he has right on his side, it will save time and trouble if the individual is allowed to act. But these conditions are not complied with till the rule of law has become second nature. In primitive times the individual, whenever he has the power or the opportunity, will help himself; and it is such self-help on all occasions that it is desirable to repress. Therefore we find that early law limits, or rather attempts to limit, far more narrowly than later law the sphere of private action.[3]

We have seen that the Anglo-Saxon law hardly allowed that killing in self-defence was justifiable.[4] With the possible exception of the right of distress damage feasant[5] (i.e. the right of the owner of land to seize the beasts of another man which are doing damage on the land), the law forbade the taking of any distress for any purpose without the leave of the court.[6] This is a general feature of the Germanic codes which they have in common with Anglo-Saxon law.[7] The person seeking to distrain must minutely follow all the steps laid down by the law. If he did not, he lost the goods which he had taken, and was liable to pay a double fine.[8] Probably such distraint was not in Anglo-Saxon law a substantive remedy

[1] Above 33.
[2] Vol. iii 612, 616-618, 625.
[3] P. and M. ii 572.
[4] Above 51.
[5] P. and M. ii 573; this right, "if not *akin* to the notion . . . that a thing, whether an animal, a slave, or an inanimate object, which had done damage to a man, might be appropriated by him in compensation, was at all events only a special exception, dictated as well by good sense as by human nature," Bigelow, History of Procedure 200; it would appear (Ine § 42) that it must be shown that the owner "will not or cannot restrain it."
[6] Leg. Henr. 51. 3, "Et nulli, sine judicio vel licentia, namiare liceat alium in suo vel alterius."
[7] Bigelow, Procedure 203-205.
[8] Ine § 9, "If any one take revenge before he demand justice; let him give up what he has taken to himself, and pay [the damage done], and make bot with xxx shillings;" Leg. Henr. 51. 4, "dupliciter emendat."

by which a creditor could get payment.[1] It was a process auxiliary to the beginning of a lawsuit. In other words, it was part of the process allowed by law to compel appearance.

Of a similar nature is the case where an owner of property was allowed to retake property which had been stolen or lost.[2] In such a case the owner must at once raise the hue and cry. All were liable if they did not assist when the hue and cry was raised;[3] and as we have seen, this is a duty which is still recognised by modern statutes.[4] So stringent was the duty of assisting the injured man that a person who allowed a thief to escape, or concealed in any way the theft, was liable to pay the thief's wergild.[5] If the owner found his property in the course of the search he could at once claim it, and, on a refusal to surrender, summon to the court the person in whose possession it had been found.[6] But here, as in the case of distraint, the rules as to following the trail from one jurisdiction to another must be rigidly followed.[7]

It is clear that both these are cases which are merely preliminary to regular legal proceedings. The individual is allowed to act in aid of the law. What he does in aid of the law is legal. On exactly the same principle the law allowed death or wounds to be inflicted to effect the capture of a criminal. The slayer of a criminal who resisted capture was guiltless.[8]

The sternness with which the law tried to repress all self-help is illustrated by the rules as to the procedure to be employed when a thief or other criminal was caught in the act, or on the raising of the hue and cry. Even here the assistance of the court was required. But the law secured recognition by accommodating itself to the passions of the injured man. This peculiar procedure, however, is perhaps the nearest approach to actual self-help which the law dared to allow.

[1] Essays in Anglo-Saxon Law 183-185; Bigelow, Procedure 206, 207. The later cases in which lords distrain tenants (ibid 207, 208) really prove nothing, as in theory the lord holds a court for these tenants (vol. i 25, 26, 176-178) and the distraint is by order of the court; vol. iii 281.

[2] Athelstan i 9, "He who attaches cattle, let v of his neighbours be named to him; and of the v let him get one who will swear with him, that he takes it to himself by folk-right,"—The "versio antiqua" has it (Thorpe ii 489) "manum mittat ad propria." For foreign analogies see Essays in Anglo-Saxon Law 207.

[3] Athelstan v 4; Leg. Henr. 65. 2, "Si quis audito clamore non exierit reddat overseunessam regis aut plane se ladiet."

[4] Vol. i 68.

[5] Ine § 36; Athelestan i 17.

[6] Athelstan i 9; Ethelred ii 8; Bigelow 212-214; Sohm, Procedure of the Salic Law § 10.

[7] For the rules to be observed as to following the track into and out of one man's land, or into and out of different districts, see Ordinance of the Dunsetas 1 (Thorpe i 353); Laws of Edmund (Thorpe i 253) § 6.

[8] Ine § 35; cp. 16 and 21.

In such cases the injured man might seize the criminal, or, if he fled, he might raise the hue and cry. When the criminal was captured he was hurried to the nearest court, with the stolen property or the other marks of guilt upon him. This was merely a preliminary to execution or other punishment. He was not allowed to say a word in his defence.[1] The injured person himself (the *sakeber*) sometimes acted as executioner.[2] The right to deal with cases of this kind was frequently granted out to private persons. Such franchises were known as Infangthef and Utfangthef.[3] It was probably not inconvenient that there should be many courts with a summary jurisdiction of this kind. In the thirteenth century Maitland says that this summary justice rid the land of many more malefactors than the king's courts could hang.[4] In the Anglo-Saxon period, when the administration of justice was far less completely organized, some such institution was still more necessary. It will obviously grow less necessary with advancing civilization. But, till the middle of the seventeenth century, the Halifax Gibbet Law was a surviving instance of this ancient institution exercised under a franchise of Infangthef.[5] But it would seem that by that date the criminal need not necessarily have been caught with the goods on him, and that, as at common law,[6] he was allowed to make some defence.[7]

We must now turn to the regular procedure of the Anglo-Saxon Law.

§ 6 Procedure

With the smallest development of a legal system it becomes necessary to provide a machinery for listening to the contentions of both the parties, and to adopt some means of deciding between them. With the methods of deciding between the parties—witnesses, ordeal, compurgation, and, after the Norman Conquest, battle, I have already dealt.[8] I must here give some account of the machinery provided by the law for getting the parties before the court, and the rules prescribing the course which they must pursue in the conduct of their case. Place, time, and the rank of the parties were all

[1] Bigelow, Procedure 214-216; P. and M. ii 495 n. 1.

[2] See Pollock's article on the King's Peace, H.L.R. xiii 179; in Y.B. 11 Hy. IV. Mich. pl. 24, there cited, *Tirwhit*, J., said, "By the ancient law when one is hanged on an appeal of a man's death, the dead man's wife and all his kin shall drag the felon to execution;" *Gascoygne*, C.J., said, "That has been so in our time;" cp. pp. 182, 183 of the Review for other similar cases.

[3] Vol. i 20. [4] P. and M. ii 577.

[5] Vol. i 20, 133; Stephen, H.C.L. i 265-270.

[6] Vol. iii 608. [7] Stephen, H.C.L. i 266-269. [8] Vol. i 302-312.

factors in determining the court to which recourse must be had; and the rules necessarily varied according to the nature of the proceedings.[1] But neither in the law of procedure nor in any other branch of the law have we yet attained to the rigid distinctions of later times. There is as yet no stereotyped set of forms of action. Real actions, personal actions, civil and criminal procedure are not yet capable of entirely distinct treatment. It is therefore possible to say something as to procedure in general. We can then deal more easily with particular cases.

The following is a general outline of the procedure usually employed:—

The plaintiff must begin by summoning his opponent to the court. The summons was a private act, the due performance of which must be proved by witnesses who were present. It must be made before sunset at the permanent residence of the defendant. It must be made upon the defendant personally, or, if he is not at home, it may be made upon his wife, seneschal, or steward.[2] Subject to any special agreement between the parties, a definite time must be given according to the distance at which the defendant resides from the county to which he is summoned.[3] In the witnesses who will testify to the due fulfilment of these formalities we can see the "good summoners" of the later writs.[4] We have no evidence that Anglo-Saxon law required any particular form of summons, like that required by the Norse procedure. "All that can certainly be affirmed is that it (the summons) must have sufficiently described the form of action as to identify it, and have required the party, on refusal of the demand, to appear before such a court on such a day, there to have judgment."[5] At the period fixed by law or by the agreement of the parties the defendant must either appear or give some recognized "essoin," i.e. excuse for non-appearance.[6] At a period when the law court was not regarded as the sole

[1] Leg. Henr. 9. 3; 57. 8, "Pensandum autem erit omni domino, sive socam, sive sacam habeat, sive non habeat, ut ita suum hominem ubique manuteneat, ne dampnum pro defensione, vel pro demissione dedecus incurrat, juxta causarum modum et locum diffinitum . . . omnes enim causæ suos habent pertractacionum modos, sive in statu quo cepere permaneant, sive de eo in alio transeant."

[2] Ibid 59. 2, "Pridie, ante solis occasum, ad domum suam . . . et per bonum testimonium vicinorum et aliquorum . . . si domi est; uxori dapifero, vel preposito, et familiæ ejus dicatur intelligibiliter, si idem abfuerit;" cp. ibid 41. 2; 41. 5, "Qui plures mansiones habet in comitatu, submoniri debet a vicecomite ad quam earum residens erit cum familia sua."

[3] Ibid 41. 2. [4] Vol. i App. I.-IX. [5] Bigelow, Procedure 224.

[6] Leg. Henr. 50, "Si sint nominata placita, et non venerit, overseunessa, juxta loci consuetudinem, sit, et alius dies ponatur ei; et tunc explacitet se, vel emendet, nisi competens soinus intercedat."

and natural method of settling disputes, at a time when travel by land or by water was slow, difficult, and dangerous, the law of essoins was one of the most practically important branches of the law of procedure. We shall see that in the following period it grew to a great bulk. In Anglo-Saxon times absence beyond the sea, the service of king or lord, sickness or tempest, were recognized essoins which would excuse appearance for varying periods.[1]

If the accused neither appeared nor produced a valid essoin steps must be taken to compel appearance. For failure to appear a fine was imposed. The summons was repeated three times; and successive failures to appear entailed fines increasing in amount.[2] These fines could be levied by distress.[3] As I have said, an unlawful distress was punished by a double fine.[4] To rescue a distress rightly taken was punished as a contempt of court.[5]

If the process of distress produced the defendant he must give security for his further appearance and submission to the court. It is only if he declined to do this, or if he was a suspected person, that he could be retained in custody.[6] The Anglo-Saxons had no regular system of prisons. At a much later period Maitland says that "the main-prize of substantial men was about as good a security as a gaol."[7] We can see therefore the importance of the system of frankpledge[8] from the point of view of the law of procedure. It made certain persons responsible for the production of a defendant. It provided pledges for his appearance. It did the work of the policeman, the bail, and the prison of more civilized times.

If the process of distress did not produce the defendant the plaintiff might in civil cases, or in cases punishable by a money fine, proceed to realize his claim.[9] It was only in the

[1] Leg. Henr. 41. 2; 67. 7.

[2] Ibid 29. 2, 3; 53. 1; 51. 1, "Qui ad hundretum secundum legem submonitus non venerit, prima et secunda vice, xxx den. culpa sit erga ipsum hundretum, nisi soinus legalis eum detineat; tercia vice plena wita sit."

[3] Ibid 29. 2.

[4] Ibid 51. 4; above 100.

[5] Ibid 51. 5, "Nemo justiciæ vel domino suo namium excutere presumat, si juste vel injuste capiatur, sed juste repetet, pledgium offerat, et terminum satisfaciendi;" ibid 7, "Qui namium excussit, reddat, et overseunessa sit."

[6] Ibid 52. 1, "Si quis vadium recti justiciæ denegnaverit, tercio interrogatus, overseunessa culpa sit, et ex judicio licet retineri eum, donec pledgios inveniat, vel satisfaciat; maxime si judicatum sit de vadio, si de capitalibus agatur in eo;" cf. ibid 65. 5.

[7] P. and M. ii 582.

[8] Vol. i 13-15, 76-79.

[9] Cnut (Secular) § 19, "And let no man take any distress, either in the shire or out of the shire, before he has thrice demanded his right in the hundred. If at the third time he have no justice, then let him go at the fourth time to the shire gemot; and let the shire appoint him a fourth term. If that then fail, let him take leave, either from hence or thence, that he may seize his own;" Leg. Henr. 53. 1.

more serious criminal cases that the contumacious person might be outlawed.[1] There was no power to try any case, civil or criminal, in the absence of the other party.[2] This is a principle which is common to other bodies of early Germanic law[3]; and it is perhaps founded upon the idea that recourse to a law court depends upon the consent of the parties. If the defendant has not consented to the jurisdiction by appearing, the court has no jurisdiction to try the case. As in the procedure of the Roman Legis Actio Sacramenti, we are reminded of the time when law courts were tribunals of arbitration.[4] English criminal procedure still retains this trace of old-time law. The prisoner must be produced before he can be tried. It retained it in civil procedure till 1832. Instead of saying to the defaulter, "I do not care whether you appear or not," it sets its will against his will: "but you shall appear."[5] Perhaps the system of trial by jury, which, as we have seen, rested theoretically upon the consent of the parties, had something to do with the long life of this rule.[6]

When the parties are before the court the plaintiff must (1) make oath that his claim or accusation is made in good faith. Penalties were provided for false accusations. "He who shall accuse another wrongfully, so that he, either in money or prosperity be the worse; if then the other can disprove that which any one would charge to him; be he liable in his tongue; unless he make him compensation with his wer."[7] (2) He must allege his claim with particularity, and in the appropriate formal words. We shall see that this formalism in pleading lived long in the law. "There was never any sudden change from the Germanic to the modern formulæ. A gradual progress from the one to the other may be traced from the pre-Norman through the Norman period to the time of Edward the First, when the modern forms of action may be considered to have assumed their definite type. The subject is somewhat obscured by the introduction of the writ process after the Conquest, and the peculiar history and development of writs into their final settled form. But if it be remembered that the writ did not, before the thirteenth century, have any necessary relation to the formulæ of pleading (further than to indicate in most cases the nature of

[1] P. and M. ii 448.

[2] Leg. Henr. 31. 7, "Et quicquid adversus absentes, in omni loco vel negocio, vel a non suis judicibus, agitur penitus evacuetur."

[3] Sohm, Procedure of the Salic Law 116, 117.

[4] Maine, Ancient Law 376, 377.

[5] P. and M. ii 593; 2 William IV. c. 39 § 16.

[6] Vol. i 326, 330-331.

[7] Laws of Edgar ii c. 4; Laws of Cnut (Secular) c. 16; Leg. Henr. 59. 14; 53. 13.

the suit), and that the formulæ of plaint and defence proceeded as in the time anterior to the general use of writs, this obscurity will be eliminated. The technical words of the modern declaration begin to appear in the language of the ancient plaint long before they appear in the writ."[1] (3) He must give pledges that he will duly prosecute his suit;[2] and these pledges were still given (though as a mere matter of form) when Blackstone wrote.[3] (4) He must back his claim with a sufficient "secta"[4] or other evidence. The nature and quality of the evidence so required will depend upon the rank of the plaintiff and the circumstances of the case. An outlaw need not be answered.[5] The oath of a thegn is worth more than the oath of a ceorl.[6] The circumstantial evidence may be so strong that there is no need for further witness, or for the preliminary oath.[7]

When the plaintiff has properly made his accusation the defendant must meet it by an oath denying its truth. This is the only mode of defence open to him; and when in later law many defences might be pleaded, these defences were still prefaced by this flat denial (*thwertutnay*).[8] He must give pledge that he will abide by the judgment of the court. Such pledge might be property; or his friends or his lord might undertake for him. If he would not give security he might be retained in custody.[9] As a general rule he could demand an

[1] Bigelow, Procedure 247, 248; for an instance of such a formula see the words which Bracton says (f. 153) must be repeated verbatim in an appeal of murder. Royal writs were known in this period, above 77; but they did not become the usual and normal way of beginning legal proceedings till the following period, E.H.R. xxvii 4, 5; below 172, 192-194.

[2] Hlothære and Eadric §§ 8, 9; Leg. Henr. 34. 4.

[3] "The whole of it is at present become a mere matter of form; and John Doe and Richard Roe are always returned as the standing pledges for this purpose. The ancient use of them was to answer for the plaintiff; who in case he brought action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation; and so the form of the judgment still is," Bl. Comm. iii 275.

[4] Vol. i 300-301; Leg. Henr. 45. 1, "Simplex enim et vacua compellacio est, ubi ex neutra parte, compellantis scilicet aut compellati, testis est."

[5] Leg. Henr. 45. 5, "Et si quis delegiatus legalem hominem accuset, funestam dicimus vocem ejus."

[6] Ibid 64. 2, "Thaini jusjurandum contravalet jusjurandum sex villanorum;" cp. 67. 2.

[7] Ibid 94. 5, "Si vulnus fiat alicui, et accusatus neget, se sexto juret sine prejuramento, quia sanguis et vulnus ipsum forade prevenerunt;" Athelstan iv 2, "And he who traces cattle into another's land; let him trace it out who owns that land, if he can; if he cannot, let the tracing stand for the fore-oath, if he accuse any one therein."

[8] P. and M. ii 605, 606; below 251; vol. iii 630-631.

[9] Ine § 62, "When a man is charged with an offence, and is compelled to give pledge, but has not himself aught to give for pledge; then goes another man, and gives his pledge for him, as he may be able to arrange, on the condition that he give himself into his hands, until he can make good to him his pledge. Then again a second time he is accused and compelled to give pledge; if he will not continue to stand for him who before gave pledge for him, and he [the accuser]

adjournment in order to consult with his friends.[1] But those accused of capital crimes must answer at once.[2] Such cases took precedence of all others. They concerned the crown.[3] Serious crime is, as we have seen, beginning to be regarded as a matter which specially concerns the crown;[4] and the crown is already in possession of certain procedural advantages. When the pleadings were complete the court decided by its medial judgment which of the parties must go to the proof, and how the proof was to be made. As we have seen, the final decision was as the proof decided. The person who successfully made the proof was the person who won his case.[5] The chance of so doing was a valuable right. Proof was a benefit, not a burden. We shall see that the decision of the question who was to make the proof and how it was to be made depended upon many different considerations in different classes of cases. Under the Kentish and West Saxon laws a settlement must be made within seven days after the case had finally been decided according to the mode of proof selected.[6]

Such then was the general course of procedure in Anglo-Saxon times. I must now say something as to the varieties of procedure in different classes of cases. I shall deal with these varieties of procedure in the following order: (1) The action for debt and actions arising out of sales; (2) criminal procedure; (3) the action for movables; (4) actions in which land or an interest in land is claimed.

(1) *The action for debt and actions arising out of sales.*

After the defendant had been summoned to court the plaintiff, as we have seen, began the proceedings with an oath as to his good faith. He then stated the substance of his claim, "In the name of the living God, as I money demand, so have I lack of that which N promised me when I mine to him sold."[7] The defendant must explicitly deny the plaintiff's claim. "In the name of the living God, I owe not to N sceatt or shilling, or penny or penny's worth; but I have discharged to him all that I owe him, so far as our verbal contracts were at first."[8] The

then imprison him; let him then forfeit his pledge, who had before given it for him;" Leg. Henr. 52. 1; 61. 17; 62. 3; 65. 5.

[1] Ibid 49. 2.

[2] Ibid 53. 3, "Omne placitum, inter quoslibet habitum, et ab eisdem, sine justitiæ majoris auctoritate, si opus est, respectari potest, exceptis capitalibus."

[3] Ibid 10. 1.

[4] Above 47-50; Leg. Henr. 53. 2, "Si quis inplacitetur de eo unde per pledgium corporis et totius pecuniæ responsurus sit, remaneat de omnibus aliis causis donec prima finis sit; quia est quodam tenus in capcione regis;" see vol. iii 329-336 for the later development of this idea.

[5] Vol. i 299-302.

[6] Hlothære and Eadric § 10; Ine § 8.

[7] Oaths 10 (Thorpe i 183).

[8] Ibid 11, 183.

defendant would then generally make his proof by witnesses or by compurgation, with or without the assistance of oath-helpers;[1] and according to the result of the process the case was decided. We have seen that it was in the action of debt that compurgation long held its ground, mainly because, as a rule, no better method of proof was possible.[2] The procedure in the case of sales or of other obligations arising out of sales was probably similar. But in such cases either party could bring forward the transaction witnesses to substantiate his assertion or denial;[3] and their statement might be decisive of the case. The purchaser thus made his claim: "In the name of Almighty God, thou didst engage to me sound and clean that which thou soldest to me, and full security against after claim, on the witness of N (the transaction witness), who then was with us two."[4] The defendant specifically denied the charge. "In the name of Almighty God, I knew not in the things about which thou suest, foulness or fraud, or infirmity or blemish, up to that day's tide that I sold it to thee; but it was both sound and clean, without any kind of fraud."[5] The transaction witness gave his evidence in corroboration of either the plaintiff or defendant's allegation. "In the name of Almighty God, as I here for N in true witness stand, unbidden and unbought, so I with my eyes oversaw, and with my ears overheard, that which I with him say."[6] If the tales of the witnesses conflicted, the court, possibly in this period, and certainly in the thirteenth century, would award the proof to the party whose account of the matter appeared the more likely to be true.[7] If both were equally likely to be true, the defendant would probably be entitled to go to the proof. As we shall see, the awarding of the proof often gave to the court an opportunity of deciding the case on the merits.[8]

(2) *Criminal procedure.*

In criminal cases the plaintiff must always make oath that he was acting in good faith[9]: "By the Lord, I accuse not N either for hatred or for envy, or for unlawful lust of gain; nor know I anything soother; but as my informant to me said, and I myself in sooth believe, that he was the thief of my property."[10]

[1] Bigelow, Procedure 297, 298, 307, 308. It is stated in Essays in Anglo-Saxon Law that the defendant's oath alone, in the absence of other evidence, sufficed; probably in such cases the judgment of the court was that the defendant made his law by his oath alone; in later times the number of compurgators required varied according to the circumstances, vol. i 306; King v. Williams (1824), 2 B. and C. 538.

[2] Vol. i 307. [3] Above 81. [4] Oaths 7 (Thorpe i 181).

[5] Ibid 9, 183. [6] Ibid 8, 181. [7] Vol. i 303. [8] Below 109-110, 112, 115.

[9] Leg. Henr. 64. 1, "Omnis tihla tractetur antejuramento, plano vel observato, sæpius aut semel, sicut loci consuetudo erit;" Cnut (Secular) § 22.

[10] Oaths 4 (Thorpe i 181).

He must then allege his claim with particularity. The Icelandic sagas give many specimens of such claims.[1] We have none from the Anglo-Saxon records. But very probably the formal words, which in the thirteenth century must be repeated verbatim in an appeal of crime, have descended from this period.[2] The defendant must then make oath denying the charge. "By the Lord, I am guiltless both in deed and in counsel of the charge of which N accuses me."[3] The court then gave judgment as to the method of proof. The usual method of proof was by compurgation. But the number of compurgators (if any) required, and the method of their choice, depended largely upon the circumstances of the case and the rank of the party.[4] According to the older law, proof by compurgation was only possible when a man had kindred who could swear with him;[5] and, as between Englishman and Welshman, the ordeal only was allowed.[6] But in the later period of Anglo-Saxon law the ordeal seems to have been regarded as more especially reserved for serious crimes, or for persons of bad character.[7] The later idea may have grown up out of the earlier, as the organization of society based on the tie of kindred decayed, and as all serious crime came to be regarded as an offence against the king. The court was the better able to come to a decision as to the mode and conditions of proof because it was composed of persons who knew something of the situation of the parties. "Unusquisque per pares suos judicandus est, et ejusdem provinciæ: peregrina vero judicia modis omnibus submovemus."[8] It is in this medial judgment as to how the proof is to be given that we can see the beginnings of a trial in the modern sense of the term. It is true that any person who successfully made his proof won his case. It is true that in many cases success in making the proof might have very little

[1] Burnt Njal, Dasent ii 235-238, 241-247, 258-260.

[2] Bigelow, Procedure 247.

[3] Oaths 5 (Thorpe i 181).

[4] Leg. Henr. 64. 7, "Quando quis jurare debeat solus, quando cum pluribus, in causa semper est et persona, juxta legalitatem et modum concausancium in omni ordine, et juxta precium capitalis et wite." If the court saw fit they might be chosen by the magistrate and not by the party—they were then said to be "unchosen," Edward § 1; Essays in Anglo-Saxon Law 299.

[5] Seebohm, Tribal Custom 403.

[6] Ordinance of the Dunsetas, Thorpe i 353.

[7] Leg. Henr. 65. 3, "Si quis adeo sit incredibilis hundreto, et a tribus simul incusetur, tunc nihil aliud interveniat, quin ad triplex ordalium eat;" Laws of Edward § 3; Laws of William I. c. 14; Cnut (Secular) § 30.

[8] Leg. Henr. 31. 7; ibid 66. 9 shows that the conditions of proof might be made harder for the suspected person, "si quis a vicecomite vel justicia regis legitime implacitetur de furto, de incendio, de robaria, vel similibus, ad triplicem ladam jure sit applicandus; tunc oportet ut die congruo xxx consacramentales habeat, quorum nullus in aliquo reculpandus sit, et cum xv eis, quos justicie selegerit, sextus decimus juret, sicut causa dictabit."

reference to the merits of the case. But, except in the case of very distinguished men, it would probably be difficult to get any considerable number of compurgators from the same neighbourhood and of the same rank of the accused to swear deliberately to be true that which the countryside knew to be false; and this would obviously be still more difficult when the compurgators were named by the magistrate.[1] We can see, therefore, that under the forms of the Anglo-Saxon criminal procedure some small scope was left for a reasonable adjudication on the facts.[2] The court by its medial judgment performed some part of the functions of the grand jury of later days. By the conditions which it imposed upon the proof, it was able to give some effect to the newer ideas as to criminal law which were, as we have seen, gradually emerging.[3] When the crown has definitely assumed jurisdiction over all serious crimes the court will become stronger, and it will be able to exercise a more effective control over the proceedings. When these obsolete processes of proof have given place to the petty jury; when the royal court can get what information it pleases by the development of the grand jury—we shall see in outline the criminal procedure of the common law.

(3) *The action for movables.*

As we might expect from the law as to ownership and possession, the Anglo-Saxons, in common with the other Germanic peoples, did not know an action based on ownership. A person whose property is no longer in his possession has either allowed it to go voluntarily out of his possession, e.g. by loan or deposit, or he has involuntarily lost it.[4]

In the first case, as we have seen, the owner's only remedy was against his bailee. He had no right of action against the whole world based on his right of property. In such cases the plaintiff claimed as in debt. The defendant could deny the claim; and he had the benefit of proof in two cases: (i) If he was no longer in possession he might prove that he was not acting fraudulently, and that the property had perished or ceased to be in his possession by no fault of his own.[5] (ii) If he was in possession he could set up any positive defence, e.g. that the property was his own by sale, inheritance, or original

[1] Athelstan i § 9; Ethelred iii § 13; Leg. Henr. 66. 6, and 66. 9 (cited above 109 n. 8).

[2] "The rational element of law must, it would seem, have asserted itself in the judgment which decided how and by whom the proof should be given; the jurisprudence of the old courts must have been largely composed of the answers to this question," Maitland, Forms of Action 310.

[3] Above 47-50, 53-54.

[4] Above 79-80; Essays in Anglo-Saxon Law 197, 198.

[5] Alfred's Dooms § 28 (Thorpe i 51); Essays in Anglo-Saxon Law 200.

acquisition. As an alternative to proving that the property was his own he might vouch to warranty.[1] But if he was in possession and could set up no positive defence, the plaintiff went to the proof and established the loan or deposit and his right to the thing. "If the defendant could not assert a particular right, it was probable that he had none, and therefore the plaintiff showed a right by the contract, which proved that the defendant was not the owner."[2]

In the second case the action lay against the person in whose possession the things were found. It was based upon the plaintiff's involuntary loss of possession; and it was, as we have seen, usually accompanied by a charge of theft against the defendant. The action therefore partakes of both a proprietary and a delictual character. It aims at regaining the object and at securing compensation for the theft. The law seems to have presumed that if property, which had gone involuntarily from the owner's possession, was found with a third person, that person was the thief. It is for this reason that all who found property were directed to give public notice of the fact;[3] and it is partly for this reason that all sales were directed to be effected in the presence of witnesses.[4]

We have seen that the person who had lost his property must raise the hue and cry.[5] Whenever he found the property he could at once seize it and claim it as his own. The person in whose possession it was found must either give up the property and pay a fine, or appear before the court with the plaintiff. If the property (which was, as I have said, usually cattle) was found as a result of following the trail, the pursuer could claim at once. The trail was evidence of guilt which would dispense with a fore-oath.[6] Otherwise the procedure began with a fore-oath by the plaintiff or by one of those who followed the trail as to the bona-fides of the claim. "By the Lord, I accuse not N either for hatred or for envy or for unlawful lust of gain; nor know I anything soother; but as my informant to me said, and I myself in sooth believe, that he was the thief of my property."[7] One of two courses was then open to the defendant. (i) He might defend the theft only; in that case he must prove that he bought the thing before witnesses, or he must be prepared to go to the proof, as the court might direct, according to the rules of criminal procedure. In any case he was obliged to give up the property,[8]

[1] Below 112-114. [2] Essays in Anglo-Saxon Law 200.
[3] Ine § 17. [4] Above 81. [5] Above 80.
[6] Athelstan iv 2; above 106 n. 7. [7] Oaths 10 (Thorpe i 183).
[8] Ine § 25, "If stolen property be attached with a chapman, and he have not bought it before good witnesses, let him prove, according to the wite, that he was neither privy to the theft nor thief, or pay as wite xxxvi shillings."

unless he had publicly bought it in London—a curious anticipation of the later rule of market overt.[1] (ii) He might defend the theft and also set up some positive defence to the claim for the return of the property. He could show, for instance, that the thing was his own,[2] or he could vouch to warranty, or he could prove that the accusation was not made bona-fide.[3] For the preparation of such defences a period of at least six months was usually allowed.[4] About the two most important of these defences—the proof that the thing belonged to the defendant, and vouching to warranty—I must give some details.

If the defendant wished to prove that the thing belonged to him he might allege either that the thing was sold to him, or that he had inherited it, or, in the case of cattle, that he had reared it.[5] Such allegations were made by the oath of the defendant and witnesses. Generally the defendant then went to the proof in support of his allegations. But if the plaintiff was equally positive that the thing was his, and was prepared to back his claim with witnesses, the court might give the benefit of proof to him whose claim appeared to be the best substantiated. If no distinction could be drawn in this way the defendant, as the person in possession, had the benefit of proof.[6] "Propriatio propinquior semper est possidenti quam repetenti."[7] And thus, just as the kind and mode of proof awarded in criminal cases allowed scope for some reasonable adjudication upon the facts,[8] so in this class of actions the decision as to who should have the benefit of proof, and as to how the proof should be given, might amount to a decision of the case according to the probable merits.

Vouching to warranty was a method by which a defendant might both rebut a charge of theft and prove the property to be his own. In such a case the defendant alleged, adducing witnesses,[9] that he bought the property from some third person.

[1] Hlothære and Eadric § 16.

[2] Oaths 3 (Thorpe 179, 181).

[3] Above 105.

[4] Leg. Henr. 5. 25, "Quidam ad repellenda imperitorum machinamenta, et suas raciones preparandas, et testes confirmandos, et consilia querenda, annum et sex menses concedi mandaverunt; quidam annum, in quo plurimi concordant, minus vero quam sex menses non reperi."

[5] Oaths 3 (Thorpe i 181); cp. ibid 185—a claim based on inheritance; Edward § 1; Athelstan i § 9.

[6] Leg. Henr. 64. 6, "Si quilibet rem in communi propriare velint sibi, et utrimque sint testes et furtiva dicatur, qui melius testimonium habebit, probacioni propior sit, et solus fracto juramento suam esse comprobet, et testes ejus plane confirmet. Si secus sit, semper erit possidens propior quam repetens et habeat."

[7] Ethelred ii § 9.

[8] Above 109-110.

[9] Cnut (Secular) § 23, "And let no man be entitled to any vouching to warranty unless he have true witness whence that came to him which is attached with him; and let the witness declare by the favour of God and his lord that he is a true witness for him, as he saw with his eyes and heard with his ears, that he rightfully obtained it."

"As I vouch it to warranty, so did he sell it to me into whose hand I now set it."[1] A warrantor who did not appear was held guilty of theft;[2] but the defendant must prove that he had duly vouched him.[3] If the warrantor appeared and denied his liability, the defendant who had vouched him was held to be guilty of theft.[4] If he admitted his liability the thing was handed to him, and the proceedings now went on against him in place of the original defendant. The warrantor could defend the action in any of the ways in which the original defendant could have defended it. Thus he might himself vouch another warrantor. In this way the property might retrace the steps by which it had come to the hands of the original defendant. "The last in the series of *auctors*, who could not put the charge upon another, must make good his defence or stand convicted of theft."[5] If one of the series was dead the defendant cleared himself of theft, and vouched the tomb, swearing that he had bought the property from the deceased.[6] The heir who had inherited from the deceased must, or friends of the deceased might, take up the warranty. If they elected to stand in his place they could as he could have done, either accept the warranty or decline to do so.[7] According to the older law this warranting could go on indefinitely. Later the number of warrantors was limited to three.[8] If the third warrantor could not prove ownership the original defendant was cleared of the theft, but the property was given up. Originally the warrantor must be vouched at his own court. This entailed much delay and travel. A law of Ethelred II. required all the warrantors to appear at the court of the defendant.[9] Varying

[1] Oaths 3 (Thorpe i 181); Bigelow, Procedure 265, 266.

[2] Ine § 53; Ethelred ii § 9.

[3] Ibid, "If anyone vouch his warranty to a dead man (unless he have heirs who will clear it); let him who vouches it show by witness, if he can, that he justly makes declaration; and thereby let him clear himself. Then will the dead be stigmatized, unless he have friends who will legally clear him, as he himself should, if he might, or were alive."

[4] Ibid, "If then he (the dead man) have those friends, who dare do so, then will the warranty fail, as well as if he were alive, and made legal denial himself. Then will he be held guilty of theft, who had it in his possession; for denial is always stronger than affirmation."

[5] Essays in Anglo-Saxon Law 220; cp. Lex. Rib. 72. 1 (there cited), "De manu in manum ambulare debet, usque dum ad eam manum veniat quæ eum (the slave) in licito ordine vendidit vel furavit."

[6] Ine § 53; Ethelred ii § 9.

[7] Ibid.

[8] Cnut (Secular) 24, "And if he have witness . . . then let it be thrice vouched to warranty: at the fourth time, let him keep possession of it, or render it to him who owns it."

[9] ii § 9, "Formerly it stood, that everybody should vouch to warranty thrice where it was first attached, and afterwards should follow the warranty wherever it might be vouched. The Witan then decreed, that it were better the warranty should always be made where it was first attached, until it could be known where

times were allowed the warrantor, according to the distance of his residence from that of the defendant.[1]

We shall see that in later law claims to chattels were asserted by quite different forms of action, and by quite a different procedure.[2] So far as chattels were concerned, these elaborate rules as to vouching to warranty went out of use. But they were adapted to the actions for land; and, as part of the machinery of the real actions, they started upon a new and eventful career. In fact, this is one of the most striking illustrations of the manner in which the land law of the following period has borrowed from the older rules chiefly applied in this period to movable property.[3]

(4) *Actions in which land or an interest in land is claimed.*

Probably similar general principles at first applied to actions for land as applied to actions for movables. The plaintiff might prove that he had bought the land, or inherited it,[4] or he could perhaps vouch to warranty. But, as I have said, land can never be treated in quite the same way as movable property. It cannot be carried away; and, what is perhaps the most important fact from the point of view of the law of procedure, the practice of making "Books" or "Læns" of land was growing. The written book or læn supplied permanent evidence of the transfer of land, and made it possible to record accurately the conditions under which it was transferred. Plaintiffs or defendants were able to offer better evidence in proof of their respective contentions than was possible in the case of movables. It is true that this consideration applies only to bookland. We have not much evidence of proceedings or transactions affecting any other class of property. But, as I have said, dealings with land must by their nature be more open —more capable of proof—than dealings with movables. The county or hundred and, therefore, the county or hundred court could know more about them. Such actions will often involve a great man. They will be actions which can only be heard by king or Witan. We therefore find that in actions relating to land the court knows more accurately the position of the parties. It can, in awarding the proof to plaintiff or defendant, apply

it would stop; lest anyone should cause a man of feeble means to toil too far and too long for his own. Let him toil the more in whose hands lay the unjust gain, and less him who lawfully claims it."

[1] Ethelred ii § 8. Probably a defendant whose warrantor failed him would have some sort of action for indemnification against him, Essays in Anglo-Saxon Law 225.

[2] Vol. iii 319-328. [3] Above 76.

[4] For this purpose the evidence of the hundred court was valuable, see Ballard, Domesday Inquest 70, and D.B. ii 424, there cited.

with greater freedom its views as to the substantial justice of the case. In the case of land, therefore, the tendency, which I have already noted[1] in other classes of cases, to make the medial judgment as to proof turn upon the reasonable probabilities of the case, is more accentuated than in any other branch of the law of procedure. We can illustrate this tendency by looking at one or two concrete cases. I shall first take two cases in which the parties did not apparently rely on written evidence.

In 825,[2] in the reign of Beornwulf of Mercia, the Bishop of Worcester brought an action in the Witan to assert his rights to certain wood pastures at Sutton, upon which the king's bailiffs had encroached. He alleged that he had had a right to two-thirds of the wood in Ethelbald's time. It is not stated that he produced evidence of this; but the court probably considered that there was some evidence, because it gave the proof to the bishop, who duly proved his claim. In 1038,[3] before the shire moot at Aylton, Eadwine son of Eanwene, claimed certain land in the possession of his mother, Eanwene. The denial by Eanwene of her son's title concluded the case. She was in possession; and the plaintiff apparently alleged nothing to show that her possession was wrongful. This case incidentally illustrates the desirability of written evidence. Eanwene manifested her right to dispose of the property by making a nuncupative will, giving it after her death to her kinswoman Leofled, the wife of Thurkil. Thurkil, who was defending Eanwene against the claim of Eadwine, induced the shire moot to uphold this disposition. He then rode to St. Ethelbert's minster and caused a record of the proceedings to be made in a church book.

I will now give two instances of cases in which the parties were able to rely on written evidence.

In 824,[4] in the reign of Beornwulf of Mercia, the monastery of Berkley sued Heaberht, Bishop of Worcester, to recover lands devised by Æthelric. The Bishop produced the will, which proved that the lands had been devised to the church of Worcester, and the court thereon awarded the proof to the bishop, which proof he duly made thirty days after at Westminster. In 844[5] a suit arose about the will of Oswulf, earldorman of East Kent. He had devised his property to his wife, her son, and his daughter, with reversion after their death to the church. On the death of the wife a synod had pronounced for the will.

[1] Above 108, 109-110, 112.
[2] Birch, C.S. no. 386; Essays in Anglo-Saxon Law 327; Earle 285.
[3] Kemble, C.D. no. 755; Essays in Anglo-Saxon Law 365.
[4] Birch, C.S. no. 379; Essays in Anglo-Saxon Law 323.
[5] Ibid no. 445; ibid 331.

Thirty-four years after, one Ethelwulf claimed that the property so devised had been purchased by his father from the testator. The Witan—apparently on the strength of the will—gave the proof to the church. It is clear from these cases that the written evidence produced by plaintiff or defendant practically decided the case. The award of proof looks very like a decision upon the evidence produced. Indeed, in some cases the king and Witan seem to have acted without the formality of allotting proof.[1] Sometimes they decided the case on the written evidence —a manner of proceeding which is, in substance, the trial by charters of the following period.[2] Sometimes they arranged a compromise between the parties.[3] A law of Cnut[4] enacted that "he who has defended land with the witness of the shire; let him have it undisputed during his day and after his day, to sell and to give to him who is dearest to him." It is clear that these judgments and compromises are already beginning to have an effect similar to the recoveries and fines of later law.

For these reasons actions for bookland were tending to fall apart from actions for movables. A man can prove by his charters that the land is his own, and may recover on the strength of that ownership;[5] and he may apparently do this at any distance of time.[6] Similarly, if land has been given subject to conditions, and, contrary to those conditions, it has come into the hands of third persons, those entitled to the benefit of the conditions may claim the land, relying upon the ownership conferred by the book.[7] It is these actions relating to bookland which are historically the most important, because, after the Conquest, the land of the more important men was held by charter; and, as we shall see, it is the land law of these more important men which has become the common law of all. We can see that a different conception of legal procedure is gradually coming to the front, which is capable, in the hands of a strong king, of revolutionizing this branch of the law.

This development in the procedure of actions relating to bookland is not surprising. Bookland was held by the important men; and it is upon the tenure of land by the important men that a feudal state rests. Suits relating to their land, suits like that heard on Penenden Heath,[8] nearly concern the state.

[1] Kemble, C.D. nos. 245, 164; Birch, C.S. nos. 430, 269; H. and S. iii 484.
[2] Bigelow, Procedure 316-318.
[3] Kemble, C.D. nos. 693, 929, 998; Birch, C.S. no. 29.
[4] Cnut (Secular) § 80.
[5] Kemble, C.D. no. 245; Birch, C.S. no. 430; Essays in Anglo-Saxon Law 330.
[6] Kemble, C.D. no. 1019; Earle 65.
[7] Kemble, C.D. nos. 327, 333; Birch, C.S. nos. 582, 589; Essays in Anglo-Saxon Law 334, 335.
[8] Ibid 369.

Although the procedure in such suits was still the old procedure, it was watched and directed by the crown or its deputies. The written book enabled the court to exercise some judgment upon the evidence offered, with the result that the old methods of proof tended to become mere formalities. A strong king will be able to assume jurisdiction over all important cases of this kind. He will be inclined to decide these cases upon the evidence either of charters or of the country-side, without recourse to modes of proof which, in the eleventh century, were already beginning to look obsolete. The court of such a king will soon evolve some general principles applicable to all such cases. Here, as in other branches of the law, the procedural developments of one age indicate the lines upon which the law itself will develop in the next.

These six hundred years of the Anglo-Saxon period are very remote from us; and they are remote not merely by reason of the lapse of centuries. They were the period of our race's infancy; and, just as the man finds it difficult to think again the thoughts of the child, so we find it difficult to enter again into the thoughts of a state of society so far away from us. But these six hundred years are important in our history. They were the years in which England was made by the men of a Teutonic race. They were the years in which these men were converted to Christianity, and admitted thereby to share in the intellectual heritage of the ancient world. Law and political organization took a form which differed from, yet in many respects resembled, the law and the political organization of contemporary continental states. England, it is true, started with no continuous tradition of law and of political ideas inherited from Rome. But the influence of some of these ideas was felt through the church, and in her political and legal development England had much in common with the continent. Both here and abroad there was a common basis of tribal custom, a partial and a superficial reception of Roman ideas of law and government, a growth of feudal conditions owing to the weakness of the state. The chief difference which we see is not a difference in legal and political ideas. It is a physical, a geographical, a racial difference. We can see that England is a small and a compact state, that it is inhabited by men similar in race, that there is no large subject population. We can see from the reigns of kings like Alfred, Athelstan, and Edgar that it can be ruled by a strong man. If a man could be found not merely

strong, but also of constructive talent, capable of perpetuating his strength in centralized institutions, there is no reason why a system of law common to the whole country should not be formed out of the discordant yet similar bodies of local custom in force in different parts of the country. That such a ruler could have been found among the Anglo-Saxons may well be doubted. They had already produced, and might again have produced, strong rulers. What was required was a ruler who combined with strength political capacity—a ruler in touch with that intellectual and pre-eminently legal renaissance which, in the eleventh century, was beginning to spread from Italy over Western Europe.[1] Such a ruler alone could develop the natural advantages of the country. It was the Norman Conquest which supplied the man and the dynasty. Neither our law nor our constitution could have been created without this temporary break in the continuity of English history. The tree must be severed and again re-united before it could flourish exceedingly—so was the vision attributed to the dying Confessor. It was no lying vision.

[1] Below 122.

BOOK III

(1066-1485)

THE MEDIÆVAL COMMON LAW

INTRODUCTION

WITH the revival of the Empire under Otto the Great (962) and his successors, a new and a better age begins for Western Europe. The foundation of the Empire by Charles the Great had marked the premature victory of the forces of law and order; the revival of this empire by Otto marked the beginning of their continuous progress. That progress was continued along intellectual lines which give to this later mediæval period its distinctive character. Therefore to understand this period we must grasp the root ideas which lay at the back of this revived Holy Roman Empire.

At bottom it rested upon two theories inherited from the Roman lawyers and the Christian Fathers. The first of these theories taught men that the government of the world should be vested in a universal ruler. But, as the world in their eyes consisted of two supplementary communities, the church and the state, each must have its universal ruler—the Pope must rule over the church, the emperor over the state. As Lord Bryce says, "The Pope, as God's vicar in matters spiritual, is to lead men to eternal life; the Emperor, as vicar in matters temporal, must so control them in their dealings with one another that they may be able to pursue undisturbed the spiritual life, and thereby attain the same supreme and common end of everlasting happiness. In the view of this object his chief duty is to maintain peace in the world, while towards the Church his position is that of Advocate, a title borrowed from the practice adopted by churches and monasteries of choosing some powerful baron to protect their lands and lead their tenants in war. The functions of Advocacy are twofold; at home to make the Christian people obedient to the priesthood, and to execute their decrees upon heretics and sinners; abroad to propagate the faith among the heathen, not sparing to use carnal weapons. Thus the Emperor answers in every point to his anti-type the Pope, his power being yet of a lower rank, created on the analogy of the papal, as the papal itself has been modelled after the elder Empire."[1] The second of these theories taught men that laws either of God or man should rule the world; and so "the Middle Ages proper,

[1] Holy Roman Empire 105-106.

from the year 1000 to the year 1500, from the emperor Henry II. to the emperor Maximilian, were ages of legal growth, ages in which the idea of right, as embodied in law, was the leading idea of statesmen, and the idea of rights justified or justifiable by the letter of the law, was a profound influence with politicians."[1] Thus it happens that mediæval history is "a history of rights and wrongs," as contrasted with modern history which, down to the French Revolution, is "a history of powers, forces and dynasties."[2]

Why then was this restored Empire and Papacy so much more successful than the empire of Charles the Great? Why were the ideas and theories which it embodied able to impress this distinct character on the whole of mediæval history?

During the eleventh century, Europe was becoming more settled. The growth of feudalism provided some security against internal anarchy and foreign invasions;[3] and in the towns of Italy and southern Europe commerce began to flourish, and civilization to appear in its train.[4] At the end of the eleventh and the beginning of the twelfth centuries there was, in consequence, something like a renaissance of learning; and it was pre-eminently a legal renaissance.[5] There was a revival of the study of the civil law based upon the text of Justinian's Corpus Juris; and the canon law was being developed into a rival system.[6] These two bodies of law provided, firstly, a background of legal theory which could be used to support not only the pretensions of emperors and popes, but also the power and influence both of the church and of temporal rulers in many different countries. Secondly their study taught lawyers to state precisely workable rules of a sort very different from the vague customary laws of the barbarian tribes, and taught statesmen to apply these rules. Both the contribution which feudalism had made to the restoration of some sort of order, and the contribution which the revival of the study of the civil law and the growth of the canon law had made to legal and political and intellectual progress, can be seen by comparing the rules laid down in the Libri Feudorum[7] with those laid down in such collections as the Lex Salica, or the Anglo-Saxon codes. Both these sets

[1] Stubbs, Lectures on Mediæval and Modern History 241-242.

[2] Ibid 239.

[3] "Long it was questionable whether the western world would not be overwhelmed by Northmen and Saracens and Magyars; perhaps we are right in saying that it was saved by feudalism," Maitland, L.Q.R. xiv 29.

[4] Vinogradoff, Roman Law in Mediæval Europe 23.

[5] "Of all centuries the twelfth is the most legal. In no other age, since the classical days of Roman law, has so large a part of the sum total of intellectual endeavour been devoted to jurisprudence," P. and M. i 88.

[6] Below 133-142.

[7] For these see below 142.

of influences thus made for the gradual development of the legal and political knowledge needed to create and administer a governmental machinery, for want of which Charles the Great's empire had perished. The revived Holy Roman Empire thus acquired a backing both of intellectual support and of physical force which enabled the theories which underlay it to attain a partial realization.

It was the church which had inherited and passed on the ideas of the older civilization to the modern world; and it was these ideas which enabled the modern world to make a far quicker progress in the direction of civilization than would otherwise have been possible.[1] It was inevitable therefore that this civilization should be coloured both by the theological ideas of the Western church, and by the legal ideas which that church had assimilated. The revived Roman empire was pre-eminently Holy; and although the theory upon which it rested could be and was expressed in legal terms, its dominant note was theological.[2] It is not surprising therefore that it was on its theological and intellectual sides that that theory was most completely realized. If we look at the development of the papal authority over the Western church—a development which is particularly striking during the pontificate of Gregory VII. (1073-1080), and at the growing elaboration and universal acceptance throughout Western Europe of the set of intellectual ideas upon which the papal authority rested, we can see that over these sides of men's lives the universal rule of the Holy Roman Empire was very real. Over things political and temporal it was never very real. The emperor might rule over Germany and maintain his theoretical rights over Rome and Italy by occasional invasions; but even the greatest of the emperors could hardly pretend to exercise any authority outside these limits; and as the states and nations of modern Europe began to approach maturity, the emperor's claim became ever more shadowy. But, though on its temporal side, the theory of the emperor's universal rule remained merely a theory, yet, indirectly, the ideas which underlay it were not without influence. In the first place, they helped to make men believe in the universal validity of the teachings of that Roman civil law which, in the twelfth century, was beginning to be learned from the text of Justinian's Corpus Juris;[3] and this belief was, as I

[1] Maine, Ancient Law 397, says of the development of criminal law in modern societies that it "was universally hastened by two causes, the memory of the Roman Empire and the influence of the Church;" this is true of many other branches of law, and of many political ideas.

[2] Below 128-131.

[3] "Roman law was living law. Its claim to live and to rule was intimately connected with the continuity of the Empire," P. and M. i 89.

have said, no small help to many temporal rulers in their efforts to master the forces of anarchy. In the second place, the study of the Roman civil law, and the use which was made of it both in the long quarrels between pope and emperor, and in the similar quarrels in many lands between state and church, afforded some sort of counterpoize to the dominance of theology over men's intellectual ideas during this period. "The monarchy of theology over the intellectual world was disputed. A lay science claimed its rights, its share of men's attention. It was a science of civil life to be found in the human heathen Digest." [1]

But during the mediæval period, this dominance of theology was not seriously threatened. Western Europe was intellectually a single state; and all men's intellectual ideas were coloured by theology. Intellectually it was a Holy Roman Empire. And the fact that for nearly five centuries it was thus a single state has affected its whole future history; for when, in the sixteenth century, it was recognized that it consisted of several independent states, it was the resulting intellectual ties between those states which made the growth of an international law possible.[2] It is true that all through this mediæval period the separate territorial states of modern Europe were growing up. It is true that this growing separation was bound sooner or later to lead to divergencies first of all in intellectual tendencies, and then in religious beliefs. But since all mediæval thought was cast in a uniform theological mould, it is not till this last divergence took place in the sixteenth century, that there was any decisive break in the unity of this mixed theological and legal set of ideas, and that the dominance of theology over men's intellects, which is characteristic of this period,[3] begins to disappear.[4] During this period we can see in the growth of the modern territorial state only one of the remote causes of the break up of that intellectual unity which resulted from the revival and the elaboration of the theories which underlay the Holy Roman Empire.

Each of these territorial states which were springing up in this common intellectual atmosphere has its separate history, because each was attaining maturity in a separate way. Hence we see the rise of national divergencies both in their law and their institutions. The most remarkable of these national divergencies was that which arose between the development of the law and

[1] Maitland, L.Q.R. xiv 32; cf. Vinogradoff, Roman Law in Mediæval Europe 43-44, for the school of law at Ravenna which advocated the imperial claims in the struggle between Gregory VII. and Henry IV.; below 136.

[2] Bk. iv Pt. I. c. 1.

[3] Below 128-130.

[4] Bk. iv Pt. I. c. 1.

institutions of England, and the development of the law and institutions of continental states. By the end of this period England had, as we shall see, developed a set of institutions and a common law which were unique in Western Europe; and it is from these differences in mediæval development that the distinguishing characteristics of the modern English state and modern English law arise. What then were the reasons why the mediæval development of the English state and English law diverged so widely from that of other countries?

Firstly, there is the geographical reason. We have seen[1] that it had become apparent in the Anglo-Saxon period that England was a small and compact state which would lend itself easily to the centralized government of a strong ruler, who could create the requisite machinery. Secondly, for a century and a half after the Norman Conquest England was governed by a succession of strong rulers in touch with the main currents of continental thought. They created the centralized institutions in which the English common law originated.[2] Men who knew something of the civil and the canon law so transfigured the old English customary law that they made it a system of law fit to govern a modern state. Hence there was no need, as in those continental states in which the old customary law had not been thus transfigured, to replace it in a later age by a wholesale reception of Roman law.[3] Thirdly, from the date of the upheaval which led to the granting of Magna Carta, no English king was able to wield such absolute authority as the Norman and Angevin kings of the preceding period. This change in the balance of the constitution had important results upon both the public and private law of the English state. By the end of the thirteenth century, the foreign influences which had made the development of a common law possible were ceasing to operate; and the common law was beginning to be developed upon purely national lines.[4] At the same period Parliament began to emerge;[5] and during the fourteenth and fifteenth centuries the common lawyers so developed the capacity of the House of Commons to control the government of the state, that it became an integral part of that government.[6] The lawyers had discovered that the supremacy of the law, which they, like other mediæval thinkers, preached,[7] was best secured by an alliance with the House of Commons.[8] We shall see that it was the formation during this period of this alliance, and its steady maintenance from that day

[1] Above 117-118.
[2] Below 145-146, 154, 188.
[3] Bk. iv Pt. I c. 1.
[4] Below 287, 318-319, 326-327.
[5] Below 302-304.
[6] Below 430-434.
[7] Below 435-436.
[8] Below 441-443.

to this, that has been more powerful than any other single cause to shape the course of English public law.

Thus by the end of this period England had developed a native common law; and that common law had laid the foundation of its own supremacy by helping to make the English Parliament an organ of the English state, which could exert an efficient control upon the executive government. In the fifteenth century the resulting divergencies between the law and institutions of England and those of France were emphasized by Fortescue.[1] But, in the fifteenth century, the semi-feudal disorder which culminated in the Wars of the Roses,[2] and the continued dominance of the mediæval theological and political theories,[3] obscured the real significance of these peculiarities in the English legal and institutional development. That significance was not fully revealed till this semi-feudal disorder was crushed by the strong rule of the Tudors, and till the Renaissance and Reformation of the sixteenth century swept away the theological and political ideas which had ruled over Western Europe all through this mediæval period.

[1] Below 569-570. [2] Below 414-416. [3] Below 411-414.

PART I

SOURCES AND GENERAL DEVELOPMENT

CHAPTER I

THE INTELLECTUAL, POLITICAL, AND LEGAL IDEAS OF THE MIDDLE AGES

THE period which stretches from the twelfth to the sixteenth century is a very distinct period in the history of Western Europe, because it was dominated by a unique set of intellectual ideas. At all periods the course of legal history must, to a large extent, be shaped by the character of these ideas; and the ideas of each successive period must be grasped if we are to understand the evolution of men's attitude towards law, and the reasons for the resulting rules. But the intellectual ideas of this period have had perhaps a more direct influence upon matters legal than at any other period in European history, because they were dominated by the conception of the rule of some sort of law. The reason for this phenomenon is obvious. It was to the legal renaissance of the twelfth century that this period owed the character and the permanence of its intellectual characteristics. Consequently it was only natural that legal conceptions should play a great part in shaping its intellectual ideas. Therefore, by way of introduction to the history of English law during this period, I shall sketch shortly the main features of these intellectual ideas, and give a brief description of the bodies of law upon which they were founded, and upon the evolution of which they have exercised a profound influence. We shall see that it is necessary to keep before our minds these intellectual ideas and the existence of these bodies of law if we are to understand the evolution both of the form and the matter of many of the rules of English law during this period.

In the Middle Ages the phenomena of the universe were looked at from the point of view of a particular theory, and explained by a series of deductions drawn logically from it. This theory—the theory of a universal church and universal state which made up the two aspects of the Holy Roman Empire[1]—was the general framework into which all speculations

[1] Above 121; as Gierke says, Political Theories of the Middle Age (Maitland's Tr.) 10, "In all centuries of the Middle Age Christendom, which in destiny is

upon religion, upon politics, and upon law were fitted. This universal church and universal state were not regarded as separate entities: they formed the two necessary parts of one society, in theory universal, in fact confined to western Christendom.[1] In the dogmas of the church deduced from the Bible, the Fathers, and other theological writers, were contained the inspired revelation as to the relations of man to God, and of man to man, which it was heresy to doubt; in the books of Aristotle and Justinian, as explained by the mediæval schoolmen, civilians, and canonists, these relations were worked out in detail, and applied to the concrete facts of mediæval society; and, as Figgis points out, "The canon law made a natural bridge to connect legal rights with ethical and theological discussion."[2] It might seem, indeed, that these universal theories of the theologians, the philosophers, and the lawyers were very remote from the actual social and political facts of the day; that the loosely compacted feudal societies of which Europe consisted assorted ill with these grandiose theories. But in reality the reconciliation was not so difficult as it might appear. The feudal theory required a culminating point and centre to complete it. Such a point was found in the theoretically world-wide dominion of the emperor; and thus in the feudal relations of tenure, with their manifold complications and wide application to all classes of society from emperor to king or prince, and from prince to peasant, were found a means whereby both the actual facts of the time could be made to fit into the framework of the Holy Roman Empire, and the actual relations of rulers of many different kinds to subjects, and of subjects to subjects, could be expressed.

Thus there was provided an all-embracing political and religious scheme which embraced all the activities of men, to which all political and religious and social phenomena could be adjusted, within and by the light of which all speculation was carried on. The ultimate authorities relied upon to support this theory, the ultimate premises upon which all reasoning was based, were the Bible, the canon and the civil law, and Aristotle.[3] The scholastic philosophers found in them the first principles from which they syllogistically deduced all knowledge with infinite minuteness. As Stubbs says,[4] "the scholastic philosophy

identical with mankind, is set before us as a single universal community, founded and governed by God himself;" cf. Baty, International Law 244, 245 for a good statement of this theory.

[1] Figgis, From Gerson to Grotius 4, "In the Middle Ages the Church was not a State, it was the State. The State, or rather the civil authority (for a separate society was not recognized), was merely the police department of the Church;" cf. ibid p. 49.

[2] Ibid 176.

[3] Woolf, Bartolus of Sasso-Ferrato 8, citing the list of authorities recognized by Bartolus; cf. Poole, Illustrations of the History of Mediæval Thought 283.

[4] Lectures on Mediæval and Modern History 242.

was an attempt to codify all existing knowledge under laws or formulæ analogous to the general principles of justice. It was no attempt, as is sometimes said, to bind all knowledge with chains to the rock of St. Peter, or even to the rock of Aristotle; just as right is one and indivisible, and all rights are referable to it (if we only knew where to find it) as the ultimate touchstone and arbiter, so Truth is one and indivisible, and the mediæval philosophy found its work in reconciling all existing knowledge logically with the One Truth which it believed itself to possess. What logic was to the philosopher legislation was to the statesman and moralist, a practical, as the other was a theoretical casuistry; an attempt to justify all its conclusions by a direct reference to first principles."

Thus all the art of the thinkers of this period was employed in drawing, by the aid of the syllogism, deductions from these first principles; and in applying these deductions to the facts of daily life by the casuistical skill with which they distinguished their manifold deductions. Upon the power to draw these deductions from their fixed premises, and to distinguish between these deductions, depended their power to originate new theories, and to adapt their ideas to the facts and events and needs of a changing age. That a capacity to distinguish means a capacity to develop will be readily apprehended by lawyers who must learn to play the casuist's part with their system of case law; and, in fact, the subtlety of the scholastic philosophers in distinguishing gave much opportunity for debate and original speculation upon the more detailed applications and consequences which they deduced from their first principles. But the manner in which this debate and speculation was carried on made it impossible to look fairly at the physical facts of the universe, and to attempt to construct a meaning from them. It was equally impossible to look fairly at the words of the Bible or Aristotle or Justinian, and to ask what those words meant to their writers. Any such attempt would probably have involved the unfortunate speculator in the guilt of heresy;[1] for all this scheme of knowledge was strictly subordinated to theological dogmas, error in which was perilous not merely to the individual, but also to other members of the state who might be infected; and perilous not merely to prospects in another world, but also to well-being in this. "The word Churchman," says Figgis,[2] "means to-day

[1] E.g. Marsiglio of Padua, and Wycliffe; for the really modern views expressed by the former in his Defensor Pacis see Poole, Illustrations of the History of Mediæval Thought 274-276; for the manner in which the latter anticipated some of the theories of the Reformation period see below 413.

[2] Respublica Christiana, Tr. R.H.S. (1911) 70.

one who belongs to the Church as against others. In the Middle Ages there were no others, or, if there were, they were occupied in being burnt." Literally and strictly all learning must be used, "ad honorem Domini Nostri Jesu Christi et ad profectum sacrosanctæ matris ecclesiæ et studii." These words pronounced to-day by the Vice-Chancellor of Oxford University when he admits a Bachelor of Arts to incept, are a faint echo from the ideas of this period when the dogmas of theology reigned over all the arts and sciences.[1]

Probably the only branch of learning in which the leaders of thought were not always in orders of one kind or another was the civil law. But, though the civilians were often opposed to theologians and the canonists,[2] they did not dispute the general theory of church and state. In the opinion of Bartolus, to dispute the power of the emperor was sacrilege,[3] and to deny that he was the lord of the world was very possibly heresy;[4] and, ever since the legal revival of the twelfth century, the civilians had been using the texts of the civil law, as the theologians and the canonists had been using scripture and the canon law, to construct a body of systematic legal knowledge by similar syllogistic processes.[5] At many points their speculations ran on parallel lines, and at many points they supplemented one another. The treatment of legal rights and duties by the lawyers was necessarily conditioned to some extent by the doctrines and dogmas of the church; and the teaching of the theologians as to the relations between God and man were deeply tinged by legal conceptions.[6]

This system of rights and duties, which were half human and half divine because they were developed in an atmosphere half theological, half legal, was the bond which held society together. Though men might dispute as to the mutual relations of its various parts, and as to their exact content, it formed the fixed premises from which all discussion started. There might be differences of opinion as to the relative powers of pope and emperor, but no one denied that both had a real authority, and that other rulers had, under them, an equally real authority.[7] No doubt, too, the practical

[1] "In the Middle Ages all departments of thought were conceived as subordinate to theology, in such a way that the methods of theology fettered and strangled free development in science or art or literature," Figgis, Divine Right of Kings 257.

[2] Below 136.

[3] Woolf, Bartolus of Sasso-Ferrato 24 n. 4. [4] Ibid 25, 27.

[5] Vinogradoff, Roman Law in Mediæval Europe 45, 46.

[6] "Perhaps it would be most accurate to say that in the Middle Ages human welfare and even religion was conceived under the form of legality, and in the modern world this has given place to utility," Figgis, From Gerson to Grotius 14.

[7] "Though a war over the great questions of Public Law might be loudly raging, still all men shared one common concept of the Universe, the supreme premises

legal rules and the political theories deduced from these premises were to a large extent evoked by the actual needs of the day; and it is chiefly for this reason that they have had a more practical and a more permanent influence than the theories of the theologians and the philosophers.[1] But all alike were dominated by this same intellectual point of view. All employed the same mode of reasoning, using the syllogism and arguing every point with a careful eye to the distinguishing of all distinguishable cases. Thus even when their theories—legal, political, or philosophical—have influenced modern thought, the actual works in which these theories are contained have been consigned to oblivion; and their theories have only lived—even as the theories of many of our lawyers recorded in the Year Books have lived—because they have been set in a new light and expressed in a modern form by writers of the sixteenth and seventeenth centuries.

This system of knowledge had very obvious shortcomings. It was, as we have seen, fatal to any real knowledge of the facts of the physical world, to any historical understanding of the facts of the ancient world, and to any real originality of thought. The facts of the physical world were looked at in the light of the statements contained in the books of authority; and the statements contained in these books were the indisputable premises from which all knowledge was deduced by logical reasoning. Man's intellect was occupied in improvising variations upon the theses which they suggested. Truth was the child of authority. On the other hand, it had obvious merits—it inspired masterpieces of learned reasoning, of architecture, and of art. But it had another merit, less obvious perhaps, but none the less real which is of the greatest importance to the historian of law; and this is to be found in the fact that it made for that theoretical supremacy of right, legal or moral, which, all through mediæval history, we see both in public and private law.[2] We may rightly regard this as the real and lasting debt which our modern law and politics owe to the law and politics of the Middle Ages. If the nations of Europe had not been thus trained and drilled by mediæval thinkers to

being regarded by mediæval minds as no discoveries to be made by men, but as the divinely revealed substratum of all human science," Gierke, op. cit. 2.

[1] Below 132, 143; as Prof. Vinogradoff points out (Roman Law in Mediæval Europe 46) the lawyers were favoured by the fact that the material from which they drew their deductions was superior to that which was at the disposal of students of other branches of knowledge—"While their fellows in the school of Divinity operated on Scripture and Canonic tradition, and the masters of arts struggled, by the help of distorted versions of Aristotle, with the rudiments of metaphysics politics and natural science, the lawyers exercised their dialectical acumen on a material really worthy of the name, namely, on the contents of the *Corpus Juris*."

[2] Above 121-122; even the emperor is bound by law, Woolf, op. cit. 45-47; much more the civitas, ibid 160, 161, or the kingdom, below 195-196, 252-256.

acknowledge the supremacy of the idea of right, the struggle of the succeeding centuries between the nations of modern Europe would have been far more bitter—so bitter that they might well have proved fatal to the continued development of Western civilization. This truth has been only too painfully illustrated by the origins and course of the Great War. The Germans deliberately repudiated all those ideas of right upon which European civilization had been built; and, reverting to the barbaric ideas of their heathen ancestors, used all the material resources of Western civilization to destroy its spiritual foundations. The continued existence of the intellectual ideas, upon which the civilization of Western Europe is based, was the stake in the struggle against a race which had reverted to its old heathen morals and its old heathen Gods and ideals.[1]

The long continuance and the far-reaching effects of this set of intellectual and political ideas is due to the fact that they were backed by systems of law which kept them before men's minds, and gave them concrete shape in legal rules which governed a large part of men's lives. The two sides of the Holy Roman Empire, and feudalism, were alike represented by different legal systems. The two sides of the Holy Roman Empire were represented by the civil and canon law. Throughout this period they were developed and applied to the changing needs of the nations of Europe by the work of successive schools of lawyers, amongst whom the Italians were, during the whole of this period, easily pre-eminent.[2] Of this development it is not necessary to speak at this point because it has little bearing upon the history of English law during this period; but I shall have something to say of it when, in the following Book of this History, I deal with the influence of the civil and canon law upon English law in the sixteenth century. And just as the two sides of the Holy Roman Empire were represented by the civil and canon law, so feudalism was represented by the Libri Feudorum. In them was found a collection of those feudal customs which, with many local variations, loosely held together the component parts of the different

[1] This fact is most clearly brought out by the German contempt for small states, and their denial of their right to exist; as Stubbs says, Lectures on Mediæval and Modern History 243-244, the continued existence of small states all through the Middle Ages is a striking testimony to the power of an ideal of right and a rule of law—"The little principalities of the Low Countries subsisted side by side with their powerful neighbours; the small kingdoms of Spain united and separated according to the special law of inheritance that was recognized by each; and when an attempt at infringement was made, the aggressor found himself matched against a wide and powerful union of powers instinctively actuated by the intention of right."

[2] "C'est l'Ecole de Bologne et les autres écoles qui se formèrent a côté d'elle en Italie qui dictèrent en France l'interpretation du droit romain; jusqu'au xvie siècle, notre pays fut tributaire, à cet égard, des docteurs italiens," Esmein, Histoire du droit Français (11th ed.) 838.

European states, and still more loosely bound those states to emperor and pope.

These three bodies of law attained the position which they occupied in mediæval Europe as the result of the Italian Renaissance of legal studies in the twelfth century. They formed, so to speak, the legal background to men's ideas, not only upon matters legal and political, but also upon matters intellectual. If therefore we would understand the intellectual, political, and legal environment into which the English common law was born, we must know something of the manner in which the great Italian lawyers of the twelfth century were reviving and republishing the civil law, creating and developing the canon law, and systematizing the feudal customs in the Libri Feudorum.

The Civil Law[1]

The system of personal laws which prevailed in Europe[2] had prevented the total disuse of Roman law. It still possessed authority, but the collections of it which were in practical use, and the methods by which it was studied, grew gradually, like the Latin language, more and more debased.

At the end of the fifth and the beginning of the sixth centuries there were three main collections of Roman law. These were the edicts of the Ostrogothic kings; the lex Romana Burgundionum (516-534), compiled by order of king Gondeband; and the lex Romana Wisigothorum, or the Breviarium Alarician anum (506), compiled by order of Alaric II., the king of the Wisigoths.[3] Of these, the first lost its importance when the kingdom of the Ostrogoths was destroyed by the Byzantines.[4] The second had a longer life; but it is of merely local importance.[5] Its arrangement follows the arrangement of the Leges Barbarorum.[6] It consists of extracts from the Theodosian, Gregorian, and Hermogenian codes, from the Institutes of Gaius and the Sentences of Paul, and from some later laws of the Burgundian kings. It was largely used as a supplement to the Breviarium Alaricianum; and it obtained its popular name of Papinianus for that reason. The manuscripts of the Breviarium Alaricianum usually went on to give a copy of the Lex Burgundionum. The Breviarium Alaricianum ended, as we shall

[1] Savigny, History of Roman Law in the Middle Ages chaps. xxii-xli; Vinogradoff, Roman Law in Mediæval Europe; P. and M. i chap. iv; Esmein, Histoire du droit Français 832-838; Brissaud, Histoire du droit Français i 67-75, 192-199; Rashdall, Universities of Europe in the Middle Ages i 89-143.

[2] Above 3 n. 2. [3] Vinogradoff, op. cit. 7. [4] Ibid.

[5] Ibid; Brissaud, op. cit. i 72-73; Esmein, op. cit. 121-122.

[6] Above 31-32.

see, with a citation from Papinian. But the scribes mistook this for the beginning of the Lex Burgundionum, and the mistake gave to this code its popular name.

The third of these collections—the Breviarium Alaricianum—was by far the most important,[1] because it "became the standard source of Roman law throughout Western Europe during the first half of the Middle Ages."[2] It was composed of extracts from the Theodosian code, and from the legislation of the emperors Theodosian II., Valentinian III., Marcian, Majorian, and Severus, an abridgment of nearly the whole of the first three books of Gaius, Paul's Sentences, some extracts from the Gregorian and Hermogenian codes, and, at the end, a single citation from Papinian. "It still testifies," says Sir Paul Vinogradoff,[3] "to considerable knowledge and experience. Its Latin is sufficiently pure; it presents a reasoned attempt to compress the enactments of the later Empire into a compendium of moderate size. The texts are accompanied by an interpretation composed either just before Alaric's code, or in connection with it, and intended to make the sense of the laws as simple and clear as possible. . . . It was rather a fine performance of the "barbarian" Visigothic king to attempt in 506 . . . to do for the Roman population under his sway what Justinian did some thirty years later with infinitely greater resources at his disposal for the Eastern Empire."

Like Justinian's Corpus Juris it is divided into the three parts of the Institutes, the Leges, and the Jus.[4] But there the resemblance ends. The Institutes are a selection from Gaius made from a severely practical point of view. All antiquarian and controversial matter is eliminated. Similar considerations have dictated the selection of the Leges. Thus, those parts of public law which were no longer applicable were omitted. But it is in its treatment of the Jus that the greatest contrast with Justinian's work appears. The work of the great Roman juris-consults—the work which has given to Roman law its continuous empire[5]—was "represented mainly by an abstract from the Sentences of Paul and by a stray text from Papinian."[6] But in the succeeding centuries even this abridgment of Alaric was found too

[1] Girard, Droit Romain 73-74; Esmein, op. cit. 118-121; Brissaud, op. cit. i 67-70; L.Q.R. xiv 19; Vinogradoff, op. cit. 7-12.

[2] Ibid 7.

[3] Ibid 7-9; see Brissaud, op. cit. i 67-68 for the manner in which it was drawn up by a commission of prudentes.

[4] Vinogradoff, op. cit. 9-12.

[5] "A world without the Digest would not have been the world that we know," Maitland, L.Q.R. xiv 21.

[6] Vinogradoff, op. cit. 11-12.

long. In the seventh and eighth centuries it was itself frequently abridged.[1]

How far there was any continuous teaching of Roman law in these Dark Ages is a question as to which there has been much controversy.[2] The better opinion seems to be that, though it was still taught, it was not taught, except possibly at Rome,[3] in any school which could be called a school of law. It was taught with other remnants of the ancient learning by the clergy and in the monasteries. As Sir Paul Vinogradoff points out, the kind of learning which was then taught was represented by the Etymologies or Origins of Bishop Isidor of Seville, which "is an Encyclopædia embracing all sorts of information collected from classical sources—on arts, medicine, Old and New Testament topics, ecclesiastical history, philology, and law."[4] The law consists of a few generalizations upon jurisprudence, and a few notes on substantive legal rules; and it was taught as an appendage to the study of rhetoric and the "ars dictaminis," i.e. the art of drawing up legal documents in proper form[5]—a very necessary art for large property owners like the monasteries.[6]

It was during the course of the eleventh century that a return was made to the texts of Justinian's Corpus Juris, and that the study of Roman law began consequently to revive. The old tale was that the Pisans, when they captured Amalfi in 1135, discovered a manuscript of the Digest, and that the emperor Lothair II. ordered it to be accepted as the law. Savigny has proved the baselessness of this tale.[7] In fact the growth of the prosperity of some of the countries of southern Europe, and more especially of the Italian cities, was the cause of this revival. An advancing civilization caused a demand for a more civilized body of law in many different places.[8] One centre of this revival was in Provence. Thence comes a tract on Roman Law called the Exceptiones Petri, which was written in the latter half of the eleventh century. It is dedicated to a magistrate of Valence, and is founded on the Corpus Juris.[9] But it was the cities of Italy which were the chief centres of this revival. Pavia[10] had

[1] Brissaud, op. cit. i 71-72; Maitland L.Q.R. xiv 19.
[2] Vinogradoff, op. cit. 26-27; cf. Maitland L.Q.R. xiv 31-32.
[3] Esmein, op. cit. 833 and n. 2.
[4] Op. cit. 28.
[5] Ibid; Esmein, op. cit. 833.
[6] Above 24, 31.
[7] History of Roman Law in the Middle Ages chap. xvii; Rashdall, Universities i 99, 100; as Esmein says, op. cit. 835, "En 1135 Irnerius avait fait son oeuvre et etait mort; à cette époque, la renaissance du droit romain avait commencé certainement depuis près d'un siècle."
[8] "Les causes de la renaissance n'ont rien d'accidentel. . . . Elles sont dues au progrès general: à une civilisation superieure il fallut du droit supérieure," Brissaud, op. cit. i. 194.
[9] Vinogradoff, op. cit. 33-37.
[10] Ibid 37-43; Esmein, op. cit. 833-834.

a famous school both of Lombard and Roman Law, of which Lanfranc was a distinguished member.[1] There is some authority for saying that the school of Rome persisted till war drove it to Ravenna,[2] where a school of Imperialistic lawyers was formed.[3] But the most famous of all these schools—the school most closely identified with the revival of legal studies, and with the method of teaching law which, with some modifications and developments, prevailed throughout the Middle Ages and even to modern times —was the school of Bologna.[4]

This school was founded by Matilda, the supporter of Gregory VII., in order to afford a counterpoise to the Imperialist lawyers of Ravenna.[5] It owes its fame to its great teacher Irnerius[6] (1100-1130). "He left after him pupils, who, in their turn, educated others, and so a school was founded, from which the Roman law rejuvenated went forth to enlighten the world, training the mind and civilizing the peoples."[7]

Irnerius[8] was not perhaps the first lecturer upon the Digest. He probably had a predecessor, one Pepo by name;[9] and it is possible that, in the time of his predecessor, some of the texts upon which Irnerius lectured were brought from Ravenna to Bologna. But it was the lectures of Irnerius which again called the attention of Europe to the original texts, and more especially to the text of the Digest, in which the true spirit of Roman law was preserved. Though he did not discover the original text, though he may not have been the first to comment or lecture upon it, there is no doubt that his teaching republished it to Europe. It is due to that teaching that the civil law was studied as a whole,[10] and not merely in small fragments; and that a

[1] Below 147. [2] Below n. 9.

[3] Vinogradoff, op. cit. 43-44.

[4] "Sa methode et sa doctrine s'imposèrent partout, et l'empreinte dont elle marqua la science du droit est si profonde qu'on peut encore en retrouver aujourd'hui la trace sur bien des points," Esmein, Histoire du droit Français 837.

[5] Vinogradoff, op. cit. 44-45.

[6] For an account of his work and writings see Esmein, op. cit. 836-837; Brissaud, op. cit. i 197-199.

[7] "Il laissa apres lui des élèves qui eux-memes en formerent d'autres, et l'Ecole etait fondée, d'où la droit romain rajeuni allait rayonner sur le monde, disciplinant les esprits, et civilisant les peuples," Esmein, op. cit. 835.

[8] The name is spelt variously—Gernerius, Warnerius, Wernerius, Varnerius, Guarnerius, Yrnerius.

[9] Savigny chaps. xxv, xxvii; Rashdall i 112, 113; Brissaud, op. cit. i 196; a passage from Odofredus, cited by Selden, Diss. ad Fletam c. 6 § 2, shows this, "Dominus Yrnerius qui fuit apud nos lucerna juris, id est primus qui docuit in civitate ista, nam primo cepit studium esse in civitate ista in artibus: et cum studium esset destructum Rome, libri legales fuerunt deportati ad civitatem Ravennæ, et de Ravenna ad civitatem ipsam. Quidam dominus Pepo cepit auctoritate sua legere in legibus;" the Digest was made the ground of a legal decision in 1076, Vinogradoff, op. cit. 44-45.

[10] In the Middle Ages the Corpus Juris Civilis was divided as follows: The *Digestum Vetus* = Bks. i-xxiv 2 of the Digest, and the first nine books of the Code;

knowledge of Roman law was a knowledge of principles and not merely of single dicta, the true bearing of which had been lost.[1] Even if the rules of Roman law were not followed, we can see that, after the teaching of Irnerius, its spirit presides over the form and manner in which rules of law were expressed. Irnerius in this way and in this sense made the study of the civil law a distinct branch of knowledge. We shall now see that Gratian, also from Bologna, some forty years later made the canon law an equally distinct and rival branch of study.

The Canon Law[2]

The Western church had grown up within the Empire; and long before the Empire had become Christian the church had begun to acquire a body of rules for the regulation of its government and the conduct of its members.[3] These rules were founded on the Bible; on the writings of the Fathers, in which were contained "the authorized interpretation of the Biblical texts and the tradition of the church;"[4] on the custom of the church, which was always recognized as a source of law;[5] and on the legislation of councils and popes. From the reign of Constantine (306-337) onwards the church became an integral part of the Empire. Its decrees ceased to be merely the rules of a voluntary society, and became law "properly so-called;" and, during the fourth century, the legislation of the church rapidly became almost as important as that of the Empire. "In the history of law, as well as in the history of dogma, the fourth century is the century of ecclesiastical councils. Into the debates of the spiritual parliaments of the Empire go whatever juristic

the *Infortiatum* = Bks. xxiv 2-xxxviii 3 of the Digest; the *Digestum Novum* = Bks. xxxviii 3 to the end of the Digest; the *Parvum Volumen*, consisting of (1) the *Tres Partes*, i.e. the last three books of the Code, the Institutes, and the Authentica, a Latin translation of the Novels, and (2) the *Libri Feudorum* (below 142). This extraordinary arrangement of the Corpus Juris is probably due to the fact that it reached Bologna, and was therefore taught there, in instalments, Rashdall, Universities i 122.

[1] Compare the use made of Roman law in the Leges Henrici (below 152-153; Scrutton, Roman Law in England 60) with the use made of it by Glanvil and Bracton (below 202-206, 267-286); see Caillemer, Le droit civil dans les Provinces Anglo-Normandes au xiie siècle 10, 11.

[2] Esmein, op. cit. 186-191, 864-870; Brissaud, op. cit. i 126-142; P. and M. i 90-96; L.Q.R. xiv 13 seqq.

[3] Ibid 14; P. and M. i 90.

[4] As Esmein, op. cit. 187, says, "Les Pères ont été en quelque sorte, les antiques *prudentes* de ce système juridique."

[5] "Le Décret de Gratien, les Décrétales de Gregoire IX exigent que la coutume soit ancienne, qu'elle ait dure quarante ans comme la prescription contre l'Eglise, qu'elle soit raisonnable, non contraire à la foi, aux lois fondamentales de l'Eglise, et aux bonnes moeurs. Dans ces conditions elle peut déroger au droit positif où y ajouter," Brissaud, op. cit. 129.

ability and whatever power of organization are left among mankind. The new supernatural jurisprudence was finding another mode of utterance; the bishop of Rome was becoming a legislator, perhaps a more important legislator than the emperor."[1] Naturally collections of the rules of church law were made. The earliest come from the Eastern church. Some of them are in the nature of custumals containing collections of important rules, which often purport to reproduce apostolic doctrine. Thus, during the course of the fourth century, there appeared a work in eight books under the title of "Apostolic Constitutions," and another shorter work called the "Apostolic Canons."[2] Others are collections of ecclesiastical legislation.[3] All these collections of church law were known to the Western church; but it was the collections of ecclesiastical legislation which had the most influence. They were taken as the models for the earliest books on canon law produced by that church.[4]

The earliest of these collections was compiled at Rome about the year 500 by the same Dionysius Exiguus who invented the present method of calculating dates by the year of Our Lord.[5] His work consists of a translation of the first fifty of the Canons of the Apostles, the canons of the more ancient Councils down to the Council of Carthage (419), and the decretals of the popes from Siricius (384) to Anastasius (498).[6] This work soon became a book of authority in the Western church—Hadrian in 774 sent an official version of it to Charles the Great, who in 802 promulgated it as a law of his Empire.[7] It helped, as Maitland has said, "to spread abroad the notion that the popes can declare, even if they cannot make law for the universal church, and thus to contract the sphere of secular jurisprudence."[8] A later collection of the same kind was made for Spain which goes by the name of the "Collectio Hispana."[9] But the most famous of these works was that collection of "False Decretals" made or composed by Isidore Mercator about the middle of the ninth century.[10] It incorporated the Collectio Hispana, and added to it a collection of some sixty decretals which purported to come from the second and third centuries. These forged decretals "are elaborate mosaics made up out of phrases from the Bible, the Fathers, genuine canons, genuine decretals, the West Goth's

[1] Maitland, L.Q.R. xiv 15.
[2] Esmein, op. cit. 187-188.
[3] Ibid 188.
[4] Ibid.
[5] Above 28.
[6] Esmein, op. cit. 188-189; Brissaud, op. cit. i 130; L.Q.R. xiv 20.
[7] Brissaud, op. cit. i 130.
[8] L.Q.R. xiv 20.
[9] Esmein, op. cit. 189—falsely attributed to Isidore of Seville; for his Etymologies see above 135.
[10] A very full account is given by Brissaud, op. cit. i 130-135; cf. Esmein, op. cit. 189-191; L.Q.R. xiv 26-27.

Roman law book." [1] They come from France, some think from Mons,[2] others from Rheims;[3] and they are only one of a number of other like forgeries which were perpetrated by the French clergy of this period.[4] They were designed to settle points of ecclesiastical law and discipline which were matters of dispute in the ninth century—just as the forged charter was designed to settle disputed questions of title to property.[5] On the one hand they set out to prove the sanctity of the ecclesiastical power and its superiority to the lay power, on the other hand to emancipate the bishops from the control of their metropolitans and provincial councils by the contention that they should be subject only to the jurisdiction of the pope.[6] They were infinitely useful to the popes in their contests for the supremacy of the spiritual power, and of their own authority. It was not till the fifteenth century that their falsity began to be suspected, and it was not till the sixteenth century that it was definitely proved. The last defence of their genuineness was written in 1628.[7]

More systematic books upon the canon law begin in the eleventh century. One of the earliest was written by Buchard of Worms between 1020 and 1022.[8] It was divided into twenty books each dealing with a separate subject; and each book is subdivided into chapters. All the various sources of the canon law are drawn upon—the Bible, the Fathers, the legislation of the Councils and the popes, and the Libri Pœnitentiales.[9] Later collections attributed to Ivo of Chartres show still greater progress in the growth of a coherent body of law.[10] They are the immediate precursors of the work which was to be the foundation of the mediæval canon law—the "Decretum Gratiani," [11] or, to give it the title which is attached to it in the most ancient manuscripts, the "concordia discordantium canonum" (circ. 1150).[12]

Gratian was a monk of Bologna. Esmein tells us that he was inferior in critical ability to Ivo of Chartres.[13] But his book superseded Ivo's and all the earlier books because it was not a mere compilation of authorities which were often contradictory,

[1] L.Q.R. xiv 27.

[2] Esmein, op. cit. 190-191. [3] Brissaud, op. cit. i 132.

[4] For instance the "False Capitularies," Brissaud, op. cit. i 111; Esmein, op. cit. 191; L.Q.R. xiv 27.

[5] Above 29-31. [6] Esmein, op. cit. 190.

[7] Brissaud, op. cit. i. 135; as Brissaud says, "Aujourd-hui que l'on sait avec la derniere precision quelle est l'origine de chacun des fragments de la collection, on a, pour ainsi dire, une démonstration directe du faux."

[8] Esmein, op. cit. 864-865. [9] For these books see above 41 n. 2.

[10] Esmein, op. cit. 865-866; Brissaud, op. cit. i 138.

[11] Esmein, op. cit. 866-868; Brissaud, op. cit. i 139-140; P. and M. i 92.

[12] The older view was that it was composed between 1141 and 1150, but a more recent view puts the date between 1139 and 1141, Brissaud, op. cit. i 139.

[13] Op. cit. 866.

but a Digest in which the materials were arranged, and in which doubtful points arising out of the authorities were discussed and settled. The work is divided into three parts. The first deals with sources of the law and ecclesiastical persons; the second with ecclesiastical jurisdiction, procedure, ecclesiastical property, and marriage; and the third with the sacraments and liturgy. It was accepted as an official collection very soon after its first appearance.[1] "It is," says Maitland,[2] "a great law book. The spirit which animated its author was not that of a theologian, not that of an ecclesiastical ruler, but that of a lawyer." This is sufficiently accounted for by the fact that its author belonged to the University of Bologna, the head and centre of the legal revival. It was only natural that, when the work was accepted as an official collection of the canon law, it should be studied and glossed like the texts of the Code and the Digest.[3] Some notes of Pancapalea, a pupil of Gratian's, have found their way into the text;[4] and, in the thirteenth century, Johannes Teutonicus (before 1215), and Bartholmaeus Brixensis (circ. 1236) compiled the two authoritative glosses upon it.[5]

Gratian's Decretum contained the papal decretals down to the year 1139. But papal legislation was active; Gratian's treatment of many of the topics contained in his book was becoming antiquated; and so the want of a new collection and a more up-to-date treatment of the law was soon felt.[6] Several were published in the latter part of the twelfth and the beginning of the thirteenth centuries. The best known is the collection in five books of Bernard of Pavia,[7] the arrangement of which was followed by the second of the official books in which the canon law is contained—the Decretals of Gregory IX., which were

[1] "The Decretum soon became an authoritative text book and the canonist seldom went behind it. All the same, it never became 'enacted law'; the canonist had for it rather that reverence which English lawyers have paid to Coke upon Littleton than that utter submission which is due to every clause of a statute," P. and M. i 92; Maitland, Canon Law in the Church of England 2, 3; in this respect it differed from the other parts of the Corpus Juris Canonici.

[2] P. and M. i 92.

[3] Ibid.

[4] Brissaud, op. cit. 139, 140.

[5] Ibid 140; the most important gloss or commentary was known as the glossa ordinaria; these two were the glossæ ordinariæ on the Decretum; on the Decretals the glossa ordinaria was that written by Bernardus Parmensis (before 1263), and on the Sext and the Clementines the glossa ordinaria was written by Joannes Andreæ (before 1348).

[6] "So copious was the flow of decretals that when, in 1234, Pope Gregory's book was published, Gratian's was already antiquated. It was already a book for the lecture room rather than for the law court. Almost all the topics that it touched . . . were regulated by new law, and many of the texts collected by Gratian were too hortative, too lax and flabby, to satisfy an age which was severing an ecclesiastical jurisprudence from mere moral theology," Maitland, Canon Law 3.

[7] Brissaud, op. cit. i 140; see below 258-259 for the influence of this book on Bracton.

published in 1234.[1] The Decretals recognized the authority of the Decretum, but they deprived of authority all the intervening collections. Their five books deal with the ecclesiastical hierarchy, procedure, the functions and duties of clerks, marriage, and crime —summed up in the line, "Judex, Judicium, Clerus, Connubia, Crimen." Each book was divided into titles and canons. In 1298 Boniface VIII. collected the decretals published since 1234 in a sixth book called the Sext. In 1313 Clement V. collected his decretals into another book called the Clementines, which was published in 1317; and in 1500 there was published a collection of the decretals of John XXII., and some issued by other popes (*extravagantes communes*) under the titles of the Extravagantes.[2] No further collections were made, so that the term "Corpus Juris Canonici" has come to mean, not the whole body of canon law, but the law contained in the Decretum, the Decretals, the Sext, the Clementines, and the Extravagantes. A revised version was issued by Gregory XIII. in 1582, and this is still the official edition.

From the time of the publication of the Decretum Gratiani the canon law stood side by side with the civil law as a distinct and rival body of learning. Both these bodies of law were taught and commented on and developed in the Universities in separate faculties and by very similar methods.[3] The students at these universities were styled legistæ if they were studying the civil law, decretistæ if they were studying the canon law. Similarly this study led up to the degrees of doctor legum or doctor decretorum, or, if they studied both laws, to the degree of doctor utriusque juris. No doubt the canon law owed much to the civil law. From the first the law of the church had been founded upon the law of the Empire; and the study of the texts of Justinian's Code and Digest gave the ecclesiastical legislators and ecclesiastical lawyers a training in legal technique, which conferred the same sort of service upon the growing canon law as it conferred upon many other bodies of customary law throughout the mediæval period[4]—notably, as we shall see, upon the nascent English common law.[5] On the other hand, the study

[1] For these and the other parts of the Corpis Juris Canonici see Esmein, op. cit. 868-870; Brissaud, op. cit. 140-142.

[2] "Decretales qui etaient en dehors des recueils precedents *extra vagantes*," Brissaud, op. cit. i 141; but the word was also used to mean the decretals not contained in Gratian's book, and even after they had been collected by Gregory, they are referred to as *Extra* or *X;* the collection published in 1500 is referred to as *Extrav. Joh. XXII.* or *Extrav. Comm.*, P. and M. i. 93 n. 2.

[3] See Bk. iv Pt. I. c. 1.

[4] "The canonist's debt to the civilian was a heavy one; he had borrowed, for instance, the greater part of his law of procedure, and he was ever ready to eke out Gratian by an appeal to Justinian," P. and M. i 95; below 143 n. 2.

[5] Below 146, 177-178, 269-270.

of the civil law in the Middle Ages was influenced in many directions by the canon law. The civil law could not be directly altered, and many parts of it were wholly inapplicable to the condition of mediæval Europe. On the other hand, the canon law was living and growing law. It could adapt itself to new conditions; and through these adaptations new rules both of substantive and adjective law could be made, which in many directions—notably in commercial matters [1]—helped the civilians of the Middle Ages to deduce from their classical texts rules fitted to guide and civilize the growing states of modern Europe.

The Libri Feudorum [2]

The Italian law schools did not neglect the principles underlying those feudal customs by which all the ranks of mediæval society from the highest to the lowest were held together. Upon these feudal customs nothing could be found in the Roman texts. But lawyers who had learned their craft by the study of those texts were quite competent to apply their art to this material. This application was made first by the Lombard law schools of Pavia; and it was only natural that it should be there made. The school of Pavia "had been harmonizing, digesting, modernizing the ancient statues of the Lombard kings, a body of law very similar to our own old English dooms." [3] The earliest collections of this body of feudal law come from the end of the eleventh or the beginning of the twelfth century. It received its final form from the school of Bologna in the course of the thirteenth century. It was taught and commented upon in the same manner as the texts of the civil and canon law, and was generally included in that part of the Corpus Juris Civilis which is known as the Parvum Volumen.[4] Thus it came to be regarded as a repertoire of general feudal jurisprudence, to be appealed to, just as Roman law was appealed to, when a specific rule was wanted.[5]

These three bodies of law thus put into concrete form and applied to the facts of daily life the dominant intellectual and political ideas of the Middle Ages. All are historically important

[1] Bk. iv Pt. I. c. 3.

[2] Esmein, op. cit. 788-789; Schulte, Histoire du droit et des institutions de L'Allemagne, Tr. par Fournier, 149, 150.

[3] P. and M. i 55.

[4] Above 136 n. 10.

[5] Schulte, op. cit. 150, says that they were used in Germany from the year 1300, and were recognized in the fifteenth century as "Droit imperial écrit;" moreover, the book "s'introduisit dans beaucoup de territoires et même dans la Saxe où cependant le pur droit féodal allemand etait en vigueur."

in mediæval legal history; but the nature and extent of their importance are very different in the Middle Ages, and still more different in later centuries. The importance of the Libri Feudorum naturally tended to decay as the rising power of the state asserted itself against even the greatest feudatories; and thus, all through the mediæval period, it was on the decline. The importance of the canon law was seriously impaired in the sixteenth century by the Reformation, and by the larger control which the state assumed over the church in Protestant and Roman Catholic countries alike. On the other hand, it is not till these last days that the construction of codes of national law has deprived the civil law of some of that practical importance which it had assumed in continental states. But throughout the Middle Ages, it would be true to say that the canon law was at least as important as the civil law; and it certainly exercised its influence over a wider sphere.[1] There were large parts of Western Europe in the Middle Ages in which the rules of the civil law were not obeyed; but throughout Western Europe the authority of the canon law was necessarily received along with the authority of the pope. Thus, during the Middle Ages, the canon law exercised a similar but a wider influence than the civil law in securing, firstly the permanence of those intellectual and political ideas by which this period is distinguished; and secondly the spread of those more enlightened legal ideas upon such matters as the machinery by which the law should be administered, the form in which its rules should be expressed, and the substance of some of its rules, all of which it had inherited from its close and continuous association with the civil law.[2]

This influence of the canon and civil law upon legal ideas was felt by all the nascent states of Western Europe in the Middle Ages. In all it led to a more speedy development of the principles both of public and private law than would otherwise have been possible.[3] But in no two states was the result of its influence upon their legal development quite the same either in degree or in date. In England its results were, as we shall see, quite unique. Under the strong and efficient rule of the Norman

[1] P. and M. i 92.

[2] As Stubbs has pointed out, Lectures on Mediæval and Modern History 352-353, the influence of these two systems in England, and the same is true elsewhere, worked in the same direction—"the 'canones legesque Romanorum' were classed together and worked together, mainly because it was only on ecclesiastical questions that the civil law touched Englishmen at all, but also because without the machinery of the civil law the canon law could not be worked; if you take any well-drawn case of litigation in the Middle Ages, such as that of the monks of Canterbury against the archbishops, you will find that its citations from the Code and Digest are at least as numerous as from the Decretum."

[3] Above 122-123.

and Angevin kings the influence of the new legal ideas, which had come with the legal renaissance of the twelfth century, was very marked. But that influence was exercised rather on the judicial machinery of the state, and on the technical expression of, and the modes of reasoning upon, legal rules, than on the substance of the rules themselves. Therefore the basis of these rules continued to be the native customary law. Thus the reception of Roman law which England experienced in the twelfth century differed from the reception of Roman law which took place in some continental states at a later date, in that it did not, to any great extent, substitute Roman for native rules. The reason for this difference is to be found in the fact that the English reception of Roman ideas in the twelfth century was caused, not so much by the inadequacy of the native rules, as by the inadequacy of the machinery for their enforcement, and the need for a more logical and a clearer statement of their contents. Hence the very completeness with which these needs were met by the men who had absorbed some of the ideas of the canon and civil law resulted in the creation of a system which was able to stand alone, and to develop on its own lines. Therefore, when, owing to political causes, these continental influences ceased to operate, England found herself possessed of a body of law which was unique in that it was at once native, centralized, and technically adequate for the needs of a progressive state.[1] Thus, although England still continued to share in the intellectual and political ideas of Western Europe, English law public and private began to diverge from the law of the continental states. The result of this process of divergence was to give England a unique body of law, which, with the expansion of England in the ensuing centuries, was destined to divide the sovereignty of the world with its Roman rival. The history of the origins and mediæval development of this unique body of law is the subject of the ensuing chapters of this Book.

[1] "In England the new learning found a small, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogmas," Maitland, L.Q.R. xiv 33.

CHAPTER II

THE NORMAN CONQUEST TO MAGNA CARTA

The Beginnings of the Common Law

THE reigns of the Conqueror and of his immediate successors were perhaps the most critical of all periods in the history of English law. It was then that it was settled that there should be a common law. It was then that some of its fundamental principles began to emerge. In this chapter I shall consider the influences which made for the growth of a common law, and shaped the development of its subject matter during this period.

This period falls chronologically into three well-marked divisions—firstly the Conquest to the death of Henry I., secondly the reign of Henry II., and thirdly the political crisis which led to the granting of Magna Carta. I shall therefore divide the history of this period into these three parts; and, when treating of the first two of them, I shall describe firstly the influence of Roman law, secondly the native sources of the law, and thirdly the state of the law.

I. The Conquest to the Death of Henry I

The Influence of Roman Law

The Conquest brought England into close touch with the main currents of the intellectual life of the Continent. Except for a few short intervals, England under the Saxon kings had stood apart from the rest of Europe.[1] The Normans, on the other hand, were perhaps the most cosmopolitan race in Europe. Of the same stock as the Saxons and the Danes, they had become French in language and in manners, just as the Danes had become practically one nation with the Saxons. In war, in learning, and in architecture they had left their mark upon all parts of Europe, Christian and infidel alike. "The indomitable vigour of the Scandinavian joined to the buoyant vivacity of the Gaul produced the conquering and ruling race of Europe."[2]

[1] Stubbs, Historical Introductions 181-184.
[2] Freeman, N.C. i 170.

They had a genius for political organization, and their dukes were pre-eminent both in war and in administration.[1] To be conquered by the Normans, therefore, was to come under the influence of the most progressive and the best governed race in Europe; and we shall see that during this period the connection of England with the Continent is closer than at any subsequent period in English history. Not only do foreigners rise to place and power in England, but Englishmen study at foreign universities and rise to eminence at foreign courts.[2] The only Englishman who has ever become Pope was elected in 1154. England probably had little to learn from Normandy itself, from Norman institutions and Norman law.[3] But England had much to gain from an introduction into European life and politics. The twelfth and the thirteenth centuries were, as we have seen, a period of renaissance in all branches of learning,[4] and more especially a period of legal renaissance. Irnerius, the four doctors, and Accursius, the greatest of the school of the Glossators, revived the study of the civil law.[5] Gratian systematized the canon law.[6] The Lombard Libri Feudorum[7] and the French Beaumanoir[8] reduced to some sort of order the customary feudal law of Europe. Glanvil and Bracton—our two great English text-writers of the twelfth and thirteenth centuries—performed, as we shall see, a similar work for the law of England.[9] English law at this most critical period was shaped by men who were acquainted with this new learning—who knew something of the civil and the canon law. Such men could not be content with the shapeless mass of tribal customs and imperfectly apprehended ideas drawn from Roman law which had passed for law in the preceding period. It was inevitable that, by the light of this new knowledge, they should reshape, modify, and systematize. In this period, therefore, the influence of the civil and canon law is perhaps the most important of all the external influences which have shaped the development of English law.

[1] Haskins, Norman Institutions 60, 61.

[2] Stubbs, Lectures on Mediæval and Modern History 129-135.

[3] P. and M. i chap. ii; we know comparatively little of Norman law owing to the absence of evidence; "its earliest law book, the older part of the Très Ancien Coutumier, dates from the very end of the twelfth century, and while there are indications of the existence of a distinctly Norman body of custom before 1066, the only formulation of the law of the Conqueror's day is a brief statement of certain of the ducal rights drawn up four years after his death by order of his sons," Haskins, Norman Institutions 4.

[4] Selden, Diss. ad Fletam vi § 3.

[5] Above 136. The four doctors were Bulgarus, Martinus, Jacobus, and Hugo; Savigny, History of Roman Law in the Middle Ages chap. xxviii; for the school of the Glossators see Bk. iv Pt. I c. 1.

[6] Above 139-140.

[7] Above 142.

[8] P. and M. ii 444, 445.

[9] Below 188-206, 232-290.

The career of Lanfranc indicates one of the sources from which this influence reached our shores straight from the fountain-head. Lanfranc when a young man had been famous as a lawyer in the law school of Pavia.[1] He had left Italy, and, while wandering through France, had fallen among thieves. He escaped with his life, and made a vow to devote his time and his talents to holy things. Asking for the poorest and humblest monastery, he was directed to the monastery of Bec, the new foundation of Abbot Herlwin. There he was welcomed; and the fame of his teaching as a lawyer and a theologian soon spread abroad the fame of the monastery. By his refutation of the heresies of Berengar, and his vindication of the correctness of his own opinions at Rome, he established his reputation as the champion of orthodoxy. William made him Abbot of Caen, and, after the Conquest, Archbishop of Canterbury. The fact that William had as his prime minister a skilled lawyer, learned in canon and civil law, learned also in Lombard law, and on that account, perhaps, capable of mastering quickly and accurately the rules of Anglo-Saxon law,[2] is, to say the least, a significant fact in the history of English law. The handwriting of Domesday Book is said to be Italian in its character.[3] Lanfranc must have had some share in that "deep speech" at Gloucester in the mid-winter of 1085 which resulted in the great survey. He may well have sent to Italy for clerks to complete the work.

But the influence of the school at Bec went further than this. At Bec Anselm was trained, during whose tenure of office as archbishop England was plunged into the contest about investitures—the beginning of those disputes between church and state which were not, as we have seen, finally settled until the Reformation.[4] From Bec, too, came Archbishop Theobald;[5] and it was in his train that Vacarius[6] came to England. He was the first teacher and the real founder of the study both of the civil and of the canon law in this country.[7]

[1] P. and M. i 54-56; Caillemer, op. cit. 7, 8; Vinogradoff, Roman Law in Mediæval Europe 39.

[2] In the suit on Penenden Heath (1071), Bigelow, Plac. A.N. 4-9, Lanfranc asserted his title to "saca, soca, tol, team, flymena frymtha, grithbreche, foresteal, hamfare, infangenetheof," and other rights so well that "in illa die qua ipsum placitum finitum fuit non remansit homo in toto regno Angliæ qui aliquid inde calumpniaretur neque super ipsas terras etiam parvum quicquid clamaret."

[3] Domesday Studies ii 492.

[4] Vol. i 584-588.

[5] E.H.R. xi 306.

[6] For Vacarius see E.H.R. xi 305, a paper by Liebermann; Collectanea vol. ii Oxford Historical Society, a paper by Professor Holland, 165-170; Savigny, History of Roman Law in the Middle Ages chap. xxxvi; Maitland, L.Q.R. xiii 133; Selden, Diss. ad Fletam c. vii; P. and M. i 97-99; Wenck, Magister Vacarius. Selden, by a mistake in punctuation, was led to identify him with Roger, Abbot of Bec, c. vii § 3.

[7] Stubbs, Lectures on Mediæval and Modern History 347, 348.

The date of the birth of Vacarius lies between 1115 and 1120. Like Lanfranc he was a Lombard by birth, and had already written upon Lombard law. Whether or no he studied or taught at Bologna or Pavia or both is not certain. But it is certain that he was influenced by both these schools. He came to England shortly after 1139 on the invitation of some of the retinue of the archbishop, possibly of John of Salisbury, possibly of Becket. He came expressly to teach Roman law; and he lived and taught at Canterbury. In the days when the universities were hardly formed the cathedral schools of the archbishops and bishops were centres of literary culture.[1] No doubt he was useful to Theobald in his relations with Rome, and especially in his litigation with Henry, Bishop of Winchester, with respect to the post of papal legate.[2] His teaching was for a time stopped by Stephen,[3] either because Stephen was "voicing the national dislike to a foreign system of law," or, more probably, because it might seem to him that a teacher of imperial law must be a partisan of the Empress Maud, the rival claimant to the throne.[4] Stephen's decree had but a transitory effect. Vacarius continued both to teach and to write; and such was the popularity of legal studies that it could be said in 1180 that the liberal arts were silenced, and that Titius and Seius had usurped the place of Aristotle and Plato.[5] Whether or no he lectured at Oxford, as Gervase states, is not certain. Dr. Liebermann inclines to believe Gervase's statement that he did,[6] partly upon the ground that "a Canterbury monk would be the last man intentionally to diminish the literary glory of his church by transferring the father of civil jurisprudence from his city to Oxford," partly upon the ground that about the year 1195 there was a flourishing school of law at Oxford, which used the treatise of Vacarius as its text-book. During the latter part of his life he entered the service of Archbishop Roger of York. He was three times

[1] Stubbs, Lectures on Mediæval and Modern History 162, 163.

[2] Gervase of Canterbury, Actus Pontificum (R.S.) ii 384 (cited Holland, loc. cit. 168, 169).

[3] John of Salisbury, Policraticus viii 22 (cited Holland, loc. cit. 165), "Tempore regis Stephani a regno jussæ sunt leges Romanæ, quas in Britanniam domus venerabilis patris Theobaldi, Britanniarum primatis, asciverat. Ne quis enim libros retineret edicto regio prohibitum est, et Vacario nostro interdictum silentium, sed Deo faciente, eo magis virtus legis invaluit, quo eam amplius nitebatur impietas infirmare;" Stubbs, Lectures on Mediæval and Modern History 348.

[4] Similarly, in 1313, Phillip the Fair confirmed a Decretal of Honorius III. which, in the interests of theology, forbade the teaching of Roman law at Paris; Phillip's reason was "sans doute que le droit romain lui paraissait dangereux, parce que les docteurs de Bologne et leurs élèves faisaient du roi de France le sujet de l'empereur d'Allemagne," Brissaud, Droit Français i 155.

[5] Holland, loc. cit. 172, citing a passage from the Philosophia of Daniel de Merlac; cp. Vinogradoff, Roman Law in Mediæval Europe 85.

[6] E.H.R. xi 308, 309.

appointed commissioner by Popes Alexander III. and Innocent III. In 1167 he obtained the prebend of Norwell. He was living as late as 1198.

His chief literary work is the Liber Pauperum, which is said to have been written in 1149.[1] It was so called because it was designed for the poor students of England.[2] It consists of extracts from the Code and Digest. Although it was at one time supposed to have perished there are in fact many manuscripts of it extant both in England and on the Continent.[3] We have also tracts from his pen upon theology and upon the canon law. He "is altogether the type of a transitional age before the different studies had separated."[4]

As we shall now see, the native sources of the law show even more markedly the transition character of the period.

The Native Sources of the Law

The native sources of the law fall into three clearly marked divisions. The first, and the least important, are the new laws enacted by William I., William II., Henry I., and Stephen. The second is a group of custumals which look backward to the Saxon period, and restate or attempt to restate and adapt the Saxon laws to the new situation created by the Conquest. The third, and the most important, springs from the strengthening of the royal power which came with the Conquest, and from those newer continental influences which came from the same source. It is the most important, because it was these influences which were making for a centralized government and a common law.

(1) The enacted law.

The genuine laws enacted by William I. are few in number. Firstly there is the ordinance dealing with the separation of the lay from the ecclesiastical jurisdiction.[5] No bishop or archdeacon was for the future to hear pleas in the hundred court, and no cause "pertaining to the government of souls" was to be

[1] E.H.R. xi 310.

[2] Proem, Wenck 65-69; Holland, loc. cit. 167, "Quibusdam enim qui mihi suggesserant opus hoc facientium instantium (qu. faciendum instantibus), et ut brevitati studerem poscentibus, quedam in ordine quidem textus componendo prius, alia vero postea in glose spargendo locum, codicem et precio levissimo comparandum et brevi tempore perlegendum, et tenuioribus precipue destinatum, divina donante liberalitate, perfeci." For its contents see Wenck 161-179.

[3] Holland, loc. cit. 168; for some account of the Avranches and other MSS. of Vacarius see Prof. de Zulueta's article E.H.R. xxxvi 545-553.

[4] E.H.R. xi 306; cp. L.Q.R. xiii 135-137.

[5] Select Charters 85; Liebermann i 485-486.

heard in any secular court.[1] At the same time William did not intend to allow the church to escape wholly from his jurisdiction and control. He laid it down that no one was to be recognized as pope without his sanction; that legislation enacted by the archbishop of Canterbury and a council of bishops must be previously sanctioned and subsequently ratified by him; and that no bishop was to implead or excommunicate his barons or ministers without his sanction.[2] Secondly, there is an ordinance as to the criminal procedure to be pursued when accusations were brought by a man of one race against a man of another race.[3] An Englishman who accused a Frenchman of theft or homicide could have trial by battle, but if the Englishman declined the battle the Frenchman could clear himself by witnesses. If a Frenchman accused an Englishman the trial could be by battle; but if battle was declined by either party on account of health, that party could get a champion. An Englishman thus accused who would defend himself neither by battle or by witnesses, could defend himself by ordeal. Similar rules were made in case of a charge of outlawry brought by the man of one race against the man of the other. This procedure is, as Maitland says, "by no means unfavourable to the men of the vanquished race."[4] Thirdly, there is a document which sets out in ten sections "the laws which William, king of the English, and his magnates ordained after the conquest of England."[5] The Christian religion was to be preserved inviolate, and the peace was to be preserved between English and Normans.[6] All free men must swear fealty to William.[7] Special penalties were provided in case of the murder of Normans; but this was not to apply to persons born in France, who had settled in England in Edward the Confessor's reign.[8] Cattle must be sold in cities and before three witnesses, and for the sale of ancient chattels there must be surety and warrantor.[9] The rules as to criminal procedure where the man of one race accused the man of another race were repeated.[10] The laws of Edward the Confessor were confirmed.[11]

[1] "Mando et regia auctoritate precipio ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam que ad regimen animarum pertinet ad judicium secularium hominum adducant."

[2] Eadmer, Hist. Nov. i 6.

[3] Liebermann i 483-484.

[4] P. and M. i 68.

[5] Select Charters 83-85; Liebermann i 486-488; its title is "hic intimatur quid Wilelmeus rex Anglorum cum principibus suis constituit post conquisitionem Angliæ."

[6] § 1.

[7] § 2.

[8] §§ 3 and 4.

[9] § 5; above 82, 85; by "rem vetustam" is probably meant, things of which the vendor was not the manufacturer—obviously, if the vendor was the manufacturer, there could be no warrantor but the vendor.

[10] § 6.

[11] § 7.

All free men were to be in frankpledge, and their pledges were to produce them in court if they committed an offence.[1] The hundred and county courts were to be held as before.[2] No man was to be sold out of the country.[3] Capital punishment was abolished.[4]

The legislation of the three succeeding reigns was still more scanty. William II. in 1093, thinking he was about to die, issued a charter which has not survived—which charter he disregarded as soon as he recovered.[5] Henry I. issued a comprehensive charter on his accession.[6] It dealt with the grievances of the church, and of the baronage and other tenants in chief; and with illegal exactions from cities and counties. It restored the laws of Edward the Confessor with the amendments made by William I. It provided that knights who performed military service were not to be liable to pay the Danegeld. Debts due to the late king were, with certain exceptions, released. Henry did not keep his promises; but the charter became very important in later history, because it was used as a precedent by the ecclesiastics and the barons who drew up Magna Carta.[7] The only other enactment of the reign which has come down to us is an ordinance for the holding of the hundred and county courts.[8] Stephen issued two charters. The first is a short charter in which he confirmed the liberties and good laws granted by Henry I.[9] The second is more specific.[10] Large privileges were granted to the church. Districts afforested by Henry I. were to be disafforested. The exactions and misdeeds of sheriffs and others were to be redressed. The good laws and the ancient and just customs were to be observed in the trial of pleas.

It is clear that these enacted laws cover very little ground. They all assume a background of customary law—the laws observed in the days of Edward the Confessor. To the attempts to state the contents of those laws, as adapted to the new situation created by the Conquest, we must now turn.

(2) The statements of customary law.

The attempts made during this period to state the customary law form an intricate collection of books which come from the early years of the twelfth century. Their history has in recent

[1] § 8; vol. i 14, 15. [2] § 8. [3] § 9. [4] § 10.

[5] "Scribitur edictum regioque sigillo firmatur, quatenus captivi quicumque sunt in omni dominatione sua relaxentur, omnia debita irrevocabiliter remittantur, omnes offensiones ante hæc perpetratæ, indulta remissione perpetuæ oblivioni tradantur. Promittuntur insuper omni populo bonæ et sanctæ leges, inviolabilis observatio juris, injuriarum gravis et quæ terreat ceteros examinatio," Eadmer, Hist. Nov. i 16.

[6] Select Charters 100-102.

[7] McKechnie, Magna Carta (2nd ed.) 28, 32.

[8] Select Charters 104. [9] Ibid 119. [10] Ibid 120-121.

years been elucidated, and their real character explained by Liebermann. The results of Liebermann's analysis have been so clearly set forth in Pollock and Maitland's history that it is only necessary to summarize shortly the conclusions reached by these authorities.[1]

Of these books the most important are the following:—

The Liber Quadripartitus.[2]—This was an attempt by a person who wrote between 1113 and 1118 to translate the Anglo-Saxon Laws into Latin. He was probably not an Englishman—very likely he was a royal clerk. "We have more than one edition of his work; these editions can be distinguished from each other by the author's increasing mastery of the English language, though to the end he could perpetrate very bad mistakes."[3] This translation was to form the first of the four books of his treatise. The second contains Henry I.'s coronation charter, and certain documents relating to the investiture controversy. The third upon legal procedure, and the fourth about theft have not come down to us. Among the Anglo-Saxon laws he regards Cnut's laws as the most recent and therefore the most important; and on that account he places them first. He does not, as Maitland says, "regard himself as a mere historian or antiquarian."[4] And others beside himself were of opinion that Cnut's laws were the most important statement of Anglo-Saxon law. Two other translations of them appeared during this period[5]—the Consiliatio[6] and the Instituta Cnuti;[7] and in both cases their authors attempted to construct from them a practical law book suited to the needs of their own day.

The Leges Henrici Primi.[8]—This work is the fullest and most important statement of the rules of the English law of the beginning of the twelfth century. It was composed about the year 1118; and it derives its name from the fact that it begins with a copy of Henry I.'s coronation charter. The book itself is a curious jumble of mixed rules. For the Anglo-Saxon laws the author seems to have been dependent on the Quadripartitus.[9] But he adds to them many fragments from

[1] P. and M. i 75-82, and the Addenda at the beginning of that vol.
[2] Liebermann i 529-546; P. and M. i 76-77.
[3] Ibid 76. [4] Ibid 77. [5] Ibid 79.
[6] Liebermann i 618-619; it is so called from its initial words.
[7] Ibid 612-617. It is a gloss and translation of Cnut's laws, with extracts from other collections, including about twelve passages of which no other text survives; for the forest laws attributed to Cnut see ibid 620-626; as Maitland says, "they are the work of a forger, who was inventing a justification for the oppressive claims of those mighty hunters the Norman kings," P. and M. i 79.
[8] Liebermann i 544-611; Thorpe i 497-608; P. and M. i 77-79.
[9] He may have been the author or projector of this work also, P. and M. i 78.

different sources. He borrows from Isidore, from Buchard of Worms on the canon law, from the Lex Salica and the Lex Riburaria, and from the Frankish capitularies. He even borrowed a sentence from an epitome of the Theodosian code. There is valuable material in the work which helps us to understand the law both of this and the preceding period. But, though the author evidently intended to make a reasoned statement of the law, both the state of his material and his intellectual equipment prevented him from succeeding. The law itself was in a very confused state. As he himself says, it was composed of three main bodies of custom, the Mercian law, the Dane law, and the West Saxon law,[1] the last named of which he considered to be the most important.[2] He himself was quite untouched by the new continental school which was soon to introduce some sort of clearness of statement and logical arrangement into the mass of tribal customs which he set himself to describe. At the same time it is only fair, as Maitland says, to remember "that he was engaged on an utterly new task; he was writing a legal text-book, a text-book of law that was neither Roman nor Canon law. To have thought that a law book ought to be written was no small feat in 1118."[3]

The Bilingual Laws of William I.[4]—These laws are contained in both a Latin and a French text. "The Latin text is a translation of the French text, though not an exact translation of any version of the French text that has come down to modern times; but very possibly the French text may have been made from a Latin or from an English original."[5] The first part consists of an intelligent summary of some of the Saxon laws, together with some laws passed in William I.'s reign. The second part consists of a few general principles which were taken from some book on Roman law. The last part consists of a translation of some parts of Cnut's laws. In Maitland's opinion the first part is a proof that attempts were being made to state the Saxon law in a rational manner; while the second part shows that the author saw the need for, but had had no means of acquiring, any of those general principles of jurisprudence which the school of Bologna was soon to spread throughout Europe.[6]

[1] Leg. Henr. vi 2.
[2] Ibid lxx 1; lxxxvii 5.
[3] P. and M. i 78.
[4] Liebermann i 492-520; Thorpe i 466-487; P. and M. i 79, 80.
[5] Ibid 79.
[6] "As to the middle section, it shows us how men were helplessly looking about for some general principles of jurisprudence which would deliver them from their practical and intellectual difficulties," P. and M. i 80.

The Leges Edwardi Confessoris.[1]—This book states that William I. in the fourth year of his reign summoned twelve men from each county that they might state to him the law of England. Their statements of the law are supposed to be contained in this book. But the author goes on to speak of what was done in the reign of William II.[2] This is a fair index to the "bad and untrustworthy"[3] character of his work. He has a bias against anything Danish, and in favour of anything West Saxon. He is also strongly prejudiced in favour of the church. "Unfortunately," as Maitland says,[4] "the patriotic and ecclesiastical leanings of the book made it the most popular of all the old law books." Hovenden inserted it into his chronicle, Bracton cited it, and it has misled constitutional historians down to quite modern times. But seeing that it states simply the views of a partial writer of Henry I.'s reign, its statements are of no value unless otherwise confirmed.

If English law had consisted merely of the scanty enactments of the Conqueror and his successors, and these confused statements of tribal custom, its outlook would have been very dark. But, as the writer of the Leges Henrici saw, there was emerging another element. Besides the three bodies of West Saxon, Mercian, and Danish custom there was "the use and custom of the king's court," which was not only stable and universal, but also to be feared because it was backed by the royal power.[5] It was this element which, while the author was writing of tribal customs, was introducing a centralized government, staffed by men who had come under the influence of the legal renaissance of the continent. It was this centralized government which was introducing changes, as the result of which we can see some signs of the beginnings of a common law which will, in a short time, render all these collections of tribal customs wholly obsolete.

(3) The new sources of law.

These new sources of law can be grouped under three heads :—(i) Domesday Book, (ii) The Pipe Rolls, and (iii) Accounts of decided cases.

[1] Liebermann i 627-672; Thorpe i 442-464; P. and M. i 81-82.
[2] C. xi, William II.'s expedition to Normandy.
[3] P. and M. i 81. [4] Ibid.
[5] "Legis eciam Anglice trina est particio . . . preter tremendum regie majestatis titulamus imperium," Leg. Henr. vi 1; "Legis eciam Anglice trina est particio; et ad eandem distanciam supersunt regis placita curiæ, quæ usus et consuetudines suas semper immobilitate servat ubique," ibid ix 9.

(i) Domesday Book.[1]

Domesday Book holds the first place among the authorities for the history of English law in this period. It was the first of those enquiries ordered by the crown for many and various purposes which afford so large a mass of authority for the history of the law in the eleventh, twelfth, and thirteenth centuries—enquiries which are closely akin to the sweeping inquisitions regularly made by the general Eyre.[2] I shall deal with Domesday Book and the subjects connected therewith in the following order:—(*a*) The object of the survey and its historical importance; (*b*) the making of the survey; (*c*) the relation of Domesday Book to various documents connected with it; (*d*) the name Domesday; (*e*) Domesday Book and the courts.

(*a*) The object of the survey and its historical importance.

The object of the survey was to compile such a description of the holdings of the various classes of persons having rights in the land as would afford an adequate basis for the assessment of the Danegeld.[3] From about the year 991 the Danegeld had been levied and paid over to the Danes as a tribute in order to buy off their invasions. In its later form (from 1012) it was a tax levied to pay the wages of a Danish fleet which had entered the service of the English crown. The tax was abolished by Edward the Confessor (about 1051) when the Danish ships had been paid off.[4] William I. was naturally not inclined to relinquish so valuable a prerogative as that of imposing direct taxation. In the Northamptonshire geld roll we have the record of a levy of Danegeld at some date previous to 1075.[5] In 1083-1084 another Danegeld of 6s. on the hide—a rate three times as large as the ordinary rate—was levied.[6] Of this levy the document known as the Inquisitio Geldi is an account.[7] The levy of a Danegeld of this

[1] The following are the best general authorities for Domesday Book:—Maitland, Domesday Book and Beyond; Round, Feudal England, Part I.; two volumes of Domesday Studies; an article by Sir F. Pollock in E.H.R. xi 209 seqq.; Ellis, General Introduction to Domesday; Ballard, The Domesday Boroughs, and The Domesday Inquest.

[2] H. E. Cam, Vinogradoff, Oxford Studies vi 11; for the general Eyre see vol. i 265-272.

[3] Domesday Studies i 77; Ballard, Domesday Inquest 6-11.

[4] Domesday Studies i 79.

[5] Feudal England 147 seqq. The document was printed by Ellis in his General Introduction to Domesday i 184-187.

[6] Domesday Studies i 80. The St. Albans chroniclers of the thirteenth century, Roger of Wendover, Matthew Paris, and Matthew of Westminster, put this levy after the survey. This may be a piece of "mere literary embellishment by an author who thought the precise order of events of no importance as compared with rounding a paragraph or pointing a moral," or it may "represent a confused tradition which was really current," E.H.R. xi 212, 213.

[7] Ibid 210. Printed by Ellis with the Exeter Domesday in vol. iv of the R.C. edition, and by the Devonshire Association in their edition of the Devonshire Domesday.

magnitude was naturally attended with difficulty; and it was with a view of amending the assessment that this survey was undertaken. The Danegeld and the Domesday survey are thus inseparably connected. "The tax of Danegeld, instituted by Ethelred at first to buy peace of the Danes, and afterwards to maintain the defence of the kingdom, had more and more come to be levied unequally and unfairly. The church had obtained enormous remissions of its liability, and its possessions were constantly increasing. Powerful subjects had obtained further remissions, and the tax had come to be irregularly collected and was burdensome upon the smaller holders and their poor tenants, while the nobility and the church escaped with a small share in the burden. In short, the tax had come to be collected upon an *old and uncorrected assessment.* In this situation William's masterly and order-loving Norman mind instituted this great enquiry . . . with the view of levying the taxes of the kingdom equally and fairly upon all."[1] Thus Domesday Book has been described as a rate book upon a large scale.[2] In the information which it contains we have a unique record of the condition of the country at the time of the Conquest and at the date (1086) of the survey.[3]

The object of the survey, therefore, was to provide a new basis of assessment for the levy of a direct tax imposed upon the land. No doubt when it was compiled it gave the king valuable information as to "the personal nexus of the various tenements."[4] No doubt also it assisted the Exchequer officials to audit the sheriffs' accounts.[5] But these were only incidental advantages which the king derived from the survey, and were not its main object. For a survey undertaken directly with the object of discovering the manner in which and the terms upon which the land was held we must look rather to the inquisition of 1166;[6] and, as we shall see, not only the Domesday survey, but many other later inquests, were capable of furnishing much information to the Exchequer officials in their work of audit.[7]

The main object then of the Domesday survey was fiscal.[8] That being so, we must not ask too much from it, or base extensive arguments upon its silence. It is not a survey in the modern topographical sense of the term. Its object was not to give an

[1] Domesday Studies i 10; above 65. [2] Ballard, Domesday Boroughs 3.

[3] A contemporary description of the survey described by Mr. Stevenson (E.H.R. xxii 72-84) gives the date as 1086—"This strongly supports the evidence of the Peterborough Chronicle and of the second volume of the Domesday Book that the year of the survey was 1086, and should dispel all doubts as to whether that was the year of the actual survey or merely of the codification of the returns," ibid. 75.

[4] Vinogradoff, Growth of the Manor 292.

[5] Domesday Studies i 35. [6] Below 183-184. [7] Below 184.

[8] Ballard, Domesday Inquest 10, 11.

account of the land law or of any other branch of the law or of the state of society. There was no idea of "numbering the people"—indeed, it may not include all classes of the people.[1] Its direct object was to describe the country with a view to its assessment to a tax; and though in such a description, at a time when all sorts of rights to jurisdiction were regarded as property,[2] there are necessarily hints and sidelights upon many legal and social topics, they are only hints and sidelights. They can only be perceived by an exhaustive analysis of the text. Except during the period immediately succeeding to that of the survey, that text has, until the last century, remained incomprehensible to all but a very few. In the fourteenth century it seems to have been obscure even to the treasurer and barons of the Exchequer. Kelham[3] tells us that, "a question arising in the twelfth of Edward the Third, whether the lands of Roger de Huntingfeld were holden of the king *ut de corona* or *ut de baronia vel honore*, the treasurer and barons of the Exchequer were directed by the king's writs to search Domesday and other records, and to call to their assistance the judges and others of the king's council, and to make their return thereof; they accordingly returned to the king in his Chancery a certificate, by which they set forth several things which were found upon the search, and (inter alia) verbatim what they found relating thereto in Domesday: but as to the words contained in the said book of Domesday they set forth, they were not able to make a declaration or interpretation of them, unless just as the words sounded—nescimus interpretationem facere nisi quatenus verba inde sonant." It is only during the last century that the text has begun to receive the study requisite to draw from it the information it contains, and to set it in its true light. It is only through that study that we may hope to gain certain information, not only as to the period of the Conquest, but also as to that much darker period which comes before the Conquest; for it comes at a time of which we have hardly any other definite information. It comes at a time when an old order of society was changing; and it was designed to bring together and compare the state of affairs before and after the change. It throws a light, as it was intended to, "tripliciter"—backwards to the Saxon period, upon the period of the Conquest, and forward to later days. "If English history is to be understood, the law of Domesday Book must be mastered."[4]

[1] E.H.R. xi 98, 213, 214.

[2] Vol. i 19, 20; it is for this reason that we find before the survey of each county descriptions of crown rights, franchises, military duties, etc., Vinogradoff, English Society 90, 91.

[3] Domesday Illustrated 245.

[4] Domesday Book and Beyond 3.

(*b*) The making of the survey.

The Anglo-Saxon Chronicle, under the year 1085, the year after the great levy of Danegeld, records that, "At mid-winter the king was at Gloucester with his witan, and there held his court five days, and afterwards the archbishop and clergy had a synod three days. After this the king had a great council, and very deep speech with his witan about the land, how it was peopled and by what men. Then sent he his men over all England, into every shire, and caused to be ascertained how many hundred hides were in the shire, or what land the king himself had, and cattle within the land, or what dues he ought to have in twelve months from the shire. Also he caused to be written how much land his archbishops had, and his suffragan bishops and his abbots, and his earls; and—though I may narrate somewhat prolixly—what or how much each man had, who was a holder of land in England, in land or in cattle, and how much money it might be worth. So very narrowly he caused it to be traced out that there was not one single hide, nor one yard (virgate) of land, nor even—it is shame to tell, though it seemed to him no shame to do—an ox, nor a cow, nor a swine, was left that was not set down in his writ. And all the writings were brought to him afterwards." The king, then, sent his commissioners round all the shires with instructions to collect the information required. They held their enquiries; and, in the course of the year, they sent their written returns to the king at Winchester. These returns, which were rigorously checked by a second set of commissioners,[1] were the raw material from which Domesday Book itself was compiled. We do not possess either the instructions to the commissioners or the returns in their original form. But we do possess, in the *Inquisitio Eliensis*,[2] a writ directing an enquiry into the manner in which the inquest was conducted in relation to the lands belonging to the abbey of Ely. In the persons named in the writ we can see one set of Domesday commissioners. In the return to the writ we can see an authentic account given by this set of commissioners as to the manner in which they conducted their share of the enquiry.

The writ is directed to Archbishop Lanfranc, and orders the enquiry to be made by the Bishop of Coutances and Bishop Walchelin, and by the others who have caused the lands of the

[1] "Alii inquisitores post alios, et ignoti ad ignotas mittebantur provincias, ut alii aliorum descriptionem reprehenderent et regi eos reos constituerent," E.H.R. xxii 74.

[2] Below 161; Feudal England 123-142. Printed by Ellis in vol. iv of the R.C. edition of Domesday, and by N. E. S. A. Hamilton.

abbey to be sworn to and recorded—as to the manner in which they were sworn to; the persons who have sworn to them; who heard the oath; what are the lands, of what extent, of what value and how called, and who are the tenants. With the information so obtained the legate of the abbot is to come to the king.[1] The return to the writ runs as follows[2]: "Herein is underwritten the enquiry into the lands, in what manner the barons of the king conducted the enquiry, that is, by the oath of the sheriff of the shire and of all the barons and their French followers, and of the whole hundred, and of the priest, reeve, and six villeins from each township; then enquiry was made as to how each manor is called, who held it in the time of King Edward, who now holds it; how many hides, how many plough teams there are in demesne, how many belonging to the tenants; how many villeins, cotarii, servi, free men, sokemen; how much wood, meadow, and pasture; how many mills and fisheries; how much has been added or taken away; how much all is worth together;[3] and how much each free man or sokeman has had or has. All this information is to be given as at three different dates, that is, in the time of King Edward, when King William gave it, and now, and whether more can be made of it than is made now."[4] The information so collected was sent within the year to the king. It is sometimes said that the whole survey was completed within this time. If such were the case we might well say that "no such miracle of clerkly and executive capacity has been worked in England since." Mr. Round's view that the words of the Anglo-Saxon Chronicle, "and all the writings were brought to him afterwards," refer to the original returns, is far more probable. The actual survey was composed later by the royal clerks from these returns.[5]

The survey as we possess it is in two volumes. They differ in size, in material, in handwriting, and in workmanship. The

[1] The following is the text of the writ, taken from Round, Feudal England 133, "Willelmus Rex Anglorum Lanfranco archiepiscopo salutem. . . . Inquire per episcopum Constantiensem et per episcopum Walchelinum et per ceteros qui terras sanctæ Ædeldrede scribi et jurari fecerunt, quo modo jurate fuerunt et qui eas juraverunt, et qui jurationem audierunt, et qui sunt terre, et quante, et quot, et quomodo vocate [et] qui eas tenent. His distincte notatis et scriptis fac ut cite inde rei veritatem per tuum breve sciam. Et cum eo veniat legatus abbatis."

[2] For the Latin text see ibid, and Stubbs, Sel. Ch. 86.

[3] Omitting the words "et quantum modo," see Feudal England 134 n. 242.

[4] It is clear from Domesday Book, as Sir Paul Vinogradoff points out (English Society 160, 161), "that the Ely formulary is anything but a complete instruction followed unswervingly throughout the realm." The survey was executed "in a very different way in various counties, according to the lights of the local juries and of the commissioners."

[5] Feudal England 139, 140; as to the manner in which they worked see Ballard, Domesday Inquest 16-18.

first is a folio volume. It contains 382 leaves of parchment, and it is divided into two columns. The leaves measure 14½ inches by 9¾. It deals with thirty-two counties. The second is a quarto volume. It contains 450 leaves. Its leaves measure 10½ inches by 6½. It is not divided into columns. "The varying quality of the parchment and the frequent changes of handwriting suggest that the volume is composed by binding together a quantity of separately prepared returns, rather than by transcribing them." It deals only with the three counties of Essex, Norfolk, and Suffolk.[1] The quantity of the information given by the second volume is far greater than that given by the first; but the quality of the information given by the first is superior to that of the second. There is considerable probability in Mr. Round's suggestion that the so-called second volume was compiled first. It was "a first attempt at the codification of the returns." In the so-called first volume the system of codification was revised. The revision was successful. The information is so compressed that a folio volume of 382 leaves sufficed for the rest of England.[2] The plan upon which it was composed renders the information it contains more accessible.

It will be observed that the survey did not cover the whole of England. "Northumberland, Cumberland, Westmoreland, and Durham are not described in the survey; neither is Lancashire under its proper title; but Furness and the northern part of the county, as well as the fourth of Westmoreland, with part of Cumberland, are included within the West Riding of Yorkshire; that part of Lancashire which lies between the rivers Ribble and Mersey, and which at the time of the survey comprehended six hundreds and a hundred and eighty-eight manors, is subjoined to Cheshire; and part of Rutlandshire is described in the counties of Northampton and Lincoln. To which may be added that, in later times, the two ancient hundreds of Atiscross and Exestan, deemed a part of Cheshire in the survey, have been transferred to the counties of Flint and Denbigh in the principality of Wales. Herefordshire, which in the time of the Conqueror appears to have been esteemed almost a Welsh county, is included in the return. In the account of Gloucestershire we find included a considerable portion of Monmouthshire, probably all between

[1] Domesday Studies ii 623-625.

[2] Feudal England 140-142. There are two abridged Domesdays extant, made for the use of the Exchequer officials: (1) a copy for the use of the chamberlains of the Exchequer; (2) a copy formerly in the office of the king's remembrancer for the use of the treasurers, Domesday Studies ii 500. The paper by Mr. Birch, ibid 496-515, gives an account of the various MSS. of Domesday: but note Mr. Round's correction of Mr. Birch's statement at p. 513 as to the Worcestershire survey, Feudal England at p. 169.

the Wye and the Usk."[1] The omission of Durham is, as we have seen, probably to be explained by the fact that the extensive immunities of Durham kept it apart from the rest of England.[2] The other three northern counties were in an unsettled state; and perhaps they too were not regarded as completely merged in the kingdom of England.[3]

The printing of Domesday Book was begun in 1773, in consequence of an address by the House of Lords to the king in 1767. It was completed in 1783. The two volumes of which it consists accurately reproduce, so far as is possible in type,[4] the characteristics of the manuscript. Two more volumes were added to this edition in 1816. The third volume consists of a general introduction and indices; the fourth of various documents connected, or supposed to be connected, with the survey—the Inquisitio Geldi of 1083-1084, the Exeter Domesday, the Inquisitio Eliensis, the Liber Wintoniæ, and the Boldon Book.

(*c*) The relation of Domesday Book to various documents connected with it.

Though we do not possess the original returns from which Domesday Book was compiled, we do possess, in certain documents connected with the Domesday survey of separate parts of England, transcripts of these returns, which seem to reproduce their form more accurately than the tabulated information to be found in the book itself. These documents are the Inquisitio Eliensis, the Inquisitio Comitatus Cantabrigiensis, and the Exeter Domesday.

The *Inquisitio Eliensis*[5] was an enquiry held at the very end of William I.'s reign into the manner in which the Domesday survey of the lands of the abbey of Ely had been conducted. We have seen that the return to the writ directing the enquiry gives us the best evidence as to the manner in which the survey itself was conducted. The document probably consisted originally of a series of rolls "which—on its contents being subsequently transcribed into a book for convenience—was allowed, precisely as happened to the Domesday rolls themselves, to disappear."[6] The returns themselves deal with the possessions of the abbey in the counties of Cambridgeshire, Herts, Essex, Norfolk, Suffolk, and Hunts. For the first two counties it is a copy of the original returns. Possibly they have also been used for Hunts. For the other three counties the version is the same as that given in the second volume of Domesday.[7]

[1] Ellis, Introduction i § 4; for the district between Ribble and Mersey see Tait, Manchester 152, 153.
[2] Vol. i 20, 21, 26, 27.
[3] Domesday Studies ii 494, 495.
[4] Ellis, General Introduction.
[5] Above 158-159.
[6] Feudal England 129.
[7] Ibid 135.

The *Inquisitio Comitatus Cantabrigiensis*[1] deals with the landowners of the county of Cambridge. It was probably written at the end of the twelfth century; and it is probably a copy of the original returns from which the Domesday survey was compiled.[2] In the Domesday survey the manors are arranged by fiefs: in this document the jurors of the hundred are enumerated, and the return is arranged according to townships. Having regard to the manner in which the survey was conducted, this is what we should expect to find.[3] It is clear from internal evidence that this document is not derived from the Inquisitio Eliensis. The latter document is often accurate when this document is in error.[4] Nor can the Inquisitio Eliensis be derived from this document because, as we have seen, it deals with a different subject matter. Both must, therefore, have been derived from some third source; and that third source is probably the copy of the original returns. It would follow that both in this document and in part of the Inquisitio Eliensis we have copies of the original returns—the raw material from which the Domesday survey was compiled.

The *Exeter Domesday* is so called because it belongs to the cathedral library at Exeter. Like the Inquisitio Comitatus Cantabrigiensis it is probably compiled from the original returns. "One important fact with regard to the MS. is the near approach which it makes to Domesday Book in its general form and palæography."[5] It describes the five counties of Wilts, Dorset, Somerset, Devon, and Cornwall. The information which it furnishes is more detailed than that of Domesday Book—thus it enumerates the live stock on the various estates. The wording is different, even when it agrees in sense with the Domesday survey. Names of persons and places are spelt differently, and sometimes are differently stated. The names of the tenants given as existing in the time of Edward the Confessor are more numerous.

It is these three documents which are most closely connected with Domesday Book. They help directly to elucidate it by showing us how it was compiled, and by giving us some glimpses of the materials used by the compilers. The holding of the great survey was a new departure. It set a precedent which was followed not only by William's successors, but also by other great

[1] The Inquisition was first identified by P. C. Webb in a paper on the Danegeld read in 1756. It was known to Kelham and Palgrave. Ellis, however, ignored it, and Freeman also was ignorant of it. N. E. S. A. Hamilton in 1876 supposed that he was the first to bring its importance to light, Feudal England 3-5.

[2] Ibid 6, 7.

[3] Above 159.

[4] Feudal England 8.

[5] Domesday Studies ii 490, 491.

landowners. Thus in the Winton Book we get two surveys of the town of Winchester, the first of which was taken by Henry I., the second by the Bishop of Winchester in the reign of Henry II.[1] In the same period we get partial surveys of different parts of the country, such as the Worcestershire survey, the Lindsey survey, the Leicestershire survey, and the Northamptonshire survey.[2] In 1183, Bishop Pudsey, of Durham, followed the royal example and caused his dominions to be surveyed. The result we have recorded in the Boldon Book.[3] In the twelfth and thirteenth centuries the extents and cartularies of the great religious houses (sometimes called Domesdays) hold, in relation to their possessions, a position somewhat similar to that which the Domesday survey held in relation to the kingdom.[4]

(*d*) The name Domesday.

Domesday Book has been very variously named. In the record itself it seems to be referred to as *Liber de Wintonia*.[5] Other names are *Rotulus Wintoniæ*, *Scriptura Thesauri Regis*, *Liber Regis*, *Liber Judiciarius*, *Censualis Angliæ*, *Angliæ Notitia et Lustratio*, *Rotulus Regis*,[6] and *Liber de Thesauro*.[7] The name which it early acquired and has permanently retained is that of "Domesday." Many and various have been the explanations of the name. The Dialogus de Scaccario tells us that it was so called by the populace because it reminded them of the Day of Judgment, so terrible and searching was the enquiry.[8] Hales' theory is that the name is derived from the fact that the inquisitions needed to obtain the requisite information were held on the "Domes-days" or law-days of the various hundreds. "Such a fact would illustrate the meaning of the term Domesday when applied alike to the Liber Censualis of the crown and to the ancient court roll of a capitular manor, as being records framed upon the oaths of jurors in a Domesday or law-day inquisition."[9] The term at first was, perhaps, as we might gather from the Dialogus, a popular term applied to the great survey. This name

[1] Vol. iv R.C. edition of Domesday, Introd. [2] Feudal England 169, 225.

[3] Vol. iv of the R.C. edition of Domesday.

[4] For instance the "Domesday of St. Paul's" of 1222. A similar Domesday had been held in 1181, the Domesday of St. Paul's (C.S.) vii 109-117. Similarly we have the Domesday of Chester, Plac. Abbrev. Introd.; and the lost Domesday of the Cinque Ports, Y.B. 5 Ed. II. (S.S.) xxviii.

[5] D.B. i 332b; E.H.R. xi 212 n. 8.

[6] Ellis, General Introduction. [7] Feudal England 143.

[8] "Hic liber *ab indigenis* Domesdei nuncupatur, id est, Dies Judicii, per metaphoram: sicut enim districti et terribilis examinis illius novissimi sententia nulla tergiversationis arte valet eludi; sic, cum orta fuerit in regno contentio de his rebus quæ illic annotantur, cum ventum fuerit ad librum, sententia ejus infatuari non potest, vel impune declinari," Dialogus I. xvi; the writer himself calls it Liber Judiciarius.

[9] Domesday of St. Paul's (C.S.) xi.

may well have been extended to the similar proceedings of the great landowners in relation to their possessions. The book when mentioned by the monkish chroniclers is usually referred to as the "liber qui vocatur Domesdei."[1] It is always so called by the courts from Edward I.'s reign onwards.

(*e*) Domesday Book and the courts.

It is clear that the facts recorded in Domesday would often in times past, and will sometimes even at the present day, be decisive of questions litigated before the courts. When such evidence is relevant the evidence of Domesday is conclusive. It is clear that in the period following upon that in which the survey was taken its evidence must often have been extremely useful. The best account of the manner in which it might be, and doubtless was thus used, is to be found in the Register of Waltham Abbey attached to a copy of that part of the survey which relates to the possessions of the abbey.[2] "Many advantages," says the writer, "may arise from the possession of the copy, because it can be seen by it how the manors of this church were held before the Conquest and at the Conquest. It can also be seen how many hides there are in every manor, and if the king should wish to tallage his realm by hides, it can be seen by how many hides our manors are taxed. . . . It can also be seen what estate the tenants of our manors have of right. . . . It can also be seen if any plea of malice long afore thought should in times future be raised by any one to take away (*quod absit*) the possessions of this church, what or what words being in the said books or rolls should be called to warranty, and likewise what advantage or gain may be brought to this church, and many other uses, although they are not here expressed, may arise from the possession of such copy." Probably the first reference to Domesday Book in litigation was made in a case heard at the Treasury at Winchester either between July, 1108, and May, 1109, or between August, 1111, and the summer of 1113. The chronicle of Abingdon states that the abbot Faritius proved his case "per librum de thesauro;" and this, in the opinion of Mr. Round and Sir F. Pollock, cannot refer to anything else but Domesday.[3] Ellis cites two cases from the Abbreviatio Placitorum of the reign of John in which litigants put themselves "super Rotulum Wintoniæ."[4] Other and later references are numerous.[5] The chief class of cases in which it

[1] Domesday Studies i 4.
[2] Cited ibid i 5.
[3] Feudal England 142, 143; E.H.R. xi 212.
[4] General Introduction 182; Plac. Abbrev. 69, 222.
[5] General Introduction 183-184—cases as to exemption from tithes; cp. Domesday Studies ii 535-537, where it is pointed out that in the discussion as to the jurisdiction of the Council of Wales in the seventeenth century (vol. i 510-511) one of the most

was referred to are cases in which the question at issue was whether or no land was held by the tenure of ancient demesne. It is only land belonging to the crown at the time of the Conquest that possessed the privileges or was subject to the liabilities involved in this tenure; and on this question Domesday Book is not only conclusive, but the only possible evidence.[1] To use Mr. Hall's words, "As a record Domesday has been certified in almost every conceivable case of dispute through the whole course of its official existence. Its mere dictum has decided the rights of the crown, the franchises of the lords, the emoluments of the church, the services of tenants, the prosperity of towns, and the social condition of villeins."[2]

(ii) The Pipe Rolls.

Domesday Book—the first and chief authority for the state of the law in the transition period which followed the Conquest—originated in the need for a fiscal reform. The Pipe Roll of 31 Henry I.[3]—the only other record which we possess of this period—also originates in the improved fiscal machinery of the Norman kings. Since good finance was the secret of the success of their government, it is not surprising that the department of the Exchequer should have been the first department of state to attain a distinct organization.[4] The composition of documents like the Inquisitio Geldi of 1084 and the Domesday survey presupposes the existence of a staff of clerks and officials specially entrusted with the care of the revenue.[5] The Pipe Roll of Henry I. would seem to show that by 1130 there was such a department in full working order. These Pipe Rolls—the great rolls of the Exchequer—contain the accounts of the king's rents and profits in all the counties of England. We possess them in a continuous series (676 rolls in all) from 1156 to 1833, omitting

important precedents was a case of Edward III.'s reign in which Montgomery and Cherbury had been certified to be in the county of Shropshire on the evidence of Domesday.

[1] Vinogradoff, Villeinage 89, 90, 109, 110; and cp. Doe d. Rust v. Roe (1794) 2 Burr. 1047-8; for this tenure see vol. iii 263-269.

[2] Domesday Studies ii 535.

[3] Printed by the Record Com. with an introduction by Hunter in 1833. There have been various conjectures as to the date of this roll. It was originally dated 1 Henry II. Internal evidence shows this to be an impossible date, as Sir Simond D'Ewes saw. Prynne suggested 5 Stephen. Madox, Exchequer (folio ed.) Disceptatio Epistolaris 63-75, showed that this date was equally impossible, though he cites the roll as of that year in his book. Hunter, Introd. vii-xix, fixes the date as 31 Henry I.

[4] Vol. i 41-44.

[5] Mr. Round (Domesday Studies i 91) says, "I am tempted to believe that these geld rolls (the Inquisitio Geldi) in the form in which we now have them were compiled at Winchester after the close of Easter, 1084, by the body which was the germ of the future Exchequer."

only the years 1216 and 1403;[1] and from 1255 to 1833 we have in the Chancellor's Roll a duplicate of the Pipe Rolls.[2] We only possess one roll of Henry I.'s reign, and that perhaps is not complete. But its composition and arrangement are exactly similar to the composition and arrangement of the continuous series. Perhaps more of the rolls of Henry I.'s reign were extant when Alexander Swereford compiled the Red Book of the Exchequer early in Henry III.'s reign.[3] Madox said of this series of the Pipe Rolls that, of all the royal records he had examined, they were the most magnificent, second only to Domesday Book, but challenging comparison even with it.[4]

(iii) Accounts of decided cases.

As yet we have no official records of decided cases. Far less must we expect to find any regular series of reports. But in the chronicles we have some accounts of lawsuits tried and decided. No doubt they are but secondary evidence; but incidentally they shed great light upon the character of the law administered. They will be found conveniently collected in Bigelow's Placita Anglo-Normanica.

The State of the Law

The law as revealed to us by these authorities is in a state of transition. If we see new royal and centralising influences in the machinery and methods of government, equally clearly we see beneath them the old Anglo-Saxon customs, which are the staple of the contemporary collections of English law—the Laws of Henry I., the Quadripartitus, the Laws of William I., the Leges Edwardi Confessoris. The language of Domesday Book and the terms which it uses bear witness to the transition character of the period. Terms like sac and soc, toll and team, infangthef and utfangthef, thegn, dreng, sochemannus, hide, geld, hundred, wapentake, bote, wite, and wer are found side by side with Norman terms like baro, comes, vicecomes, vavassor, villanus, relief, homage, feudum, manerium.[5] There is as yet no stable vocabulary of technical terms. Even when such a vocabulary has been formed some of the older terms will not die. They will linger on in the old local courts, diminishing in importance

[1] Hunter, Pipe Roll 31 Henry I. ii; Madox, Exchequer (folio ed.) Dis. Epist. 63, 64.

[2] Scargill-Bird, Guide to Records (R.S.) 326.

[3] Below 224-226; Hunter, op. cit. iv.

[4] Dis. Epist. 64.

[5] Domesday Book and Beyond 8, 9; D.B. i 11b (sac et soc), 53 (vavassor), 75 (taini), 280b, 298b (sac et soc, thol et thaim), 262 b; ii 446; for a collection of these terms see Archbishop Lanfranc v. Bishop Odo, Bigelow, Plac. A.N. 4-9, above 147 n. 2, and cp. ibid 24; Pipe Roll 31 Henry I. 112 (heimfare, soca de Biham), 132 (thegns and drengs); for the meaning of some of these terms see vol. i 20.

with the decline of those courts, meaningless for the most part to statesman, judge, and juror, but dear to historians and antiquarians.

This confused vocabulary is an index to the state of all branches of the law.

The ranks of the people are not the ranks known to Anglo-Saxon law, nor are they those known to the common law at the time of Bracton. The higher classes and the official classes are for the most part of Norman origin and called by a Norman style.[1] But William was the successor of Edward the Confessor. He intended to govern the country by Edward's laws. At the beginning of his reign he retained some Englishmen in power, and we have extant English writs addressed to them.[2] We meet with thegns, free men holding freely, and sochemanni. The two latter classes were probably the free shareholders in the open fields.[3] The villani, the cottarii, and the servi mentioned in the questions asked by the Domesday commissioners[4] probably represent, roughly and only roughly, the dependent classes whose labour cultivated the lord's manor.[5] No question was asked as to the extent of their holdings, as in the case of the freemen and the sochemanni. We can see that the slaves of Anglo-Saxon law are still known to the law. They are sharply distinguished from even the poorest villanus or cottarius.[6] In fact the villanus of Domesday might be a man of property. We are far as yet from the legal doctrines which will make the villein a serf—which will, while in some respects assimilating him to a slave, admit that he has public duties, and that he is free as against all except his lord.[7] No doubt the Conquest began the process which, degrading the villein on the one hand and raising the slave on the other, created the peculiar villein status of later law.[8] The process has not yet gone far. We still see in Domesday the old distinctions of ranks, many of which were destined to disappear before the generalizations of royal justice.

[1] Barones, D.B. i 75, Exon. D.B. passim; Vavassors, above 166 n. 5; the term "comes" represents the earldorman. Godwin is generally so styled; the term "miles" may represent the Norman knight or the English thegn, Domesday Book and Beyond 8, 9.

[2] Round, Feudal England 421 seqq.; Sel. Ch. (Charter to London) 82, 83.

[3] E.H.R. xi 225-229.

[4] Above 159.

[5] Vinogradoff, Manor 340, 341; English Society, 449-462.

[6] E.H.R. xi 225; Domesday Book and Beyond 30-36.

[7] Vol. iii 493-495.

[8] Dial. de Scaccario (Sel. Ch. 202) says that the Norman lords oppressed the natives till, on the advice of the king, they made terms, and, "Sic igitur quisquis de gente subacta fundos vel aliquid hujus modi possidet, non quod ratione successionis deberi sibi videbatur, adeptus est; sed quod solummodo meritis suis exigentibus, vel aliqua pactione interveniente, obtinuit;" see Vinogradoff, English Society 424-426 for the evidence from D.B. of this process.

The land law is in much the same case. We have seen that the latest forms of Anglo-Saxon landowning needed little more than to be restated from the point of view of the Norman ideas as to tenure, and to be expressed in the technical terms appropriate to these ideas, to bring them into line with the system familiar to lawyers, who had been brought up "in one of the most fully developed feudal societies in Europe."[1] This process was begun under the first three Norman kings; and, as we shall see, the king's court eventually reduced to order the chaos of local custom by creating certain types of tenure to which all land ownership which fell within its jurisdiction must conform. But at this period we are far from this finished result. As yet there is a mixture of ideas old and new. The Norman baron's rights were often determined by the rights of his Saxon "antecessor"; and this "ensured a wholesale reception of Old English land law by the French conquerors."[2] The making and the arrangement of Domesday Book shows us that the land law is at the parting of the ways between the Anglo-Saxon ideas and Norman and feudal ideas; for while the original returns were collected from the hundreds and the book itself is arranged by counties, the property within each county is arranged by fiefs.[3]

Very characteristic of this period are certain survivals which lasted on till a later period in the history of our law. The Northumbrian tenures in thegnage and drengage, as they existed in the thirteenth century and beyond, were wonderfully confused in their incidents. These incidents seemed to point now to military, now to socage, now to unfree tenure. They could not be brought within the legal categories of a later age because they came from a period when these categories were as yet unknown.[4]

[1] Haskins, Norman Institutions 5; above 73-75.

[2] Vinogradoff, English Society 224; for an instance see ibid 228.

[3] Round, Feudal England 236 n. 41; "though the necessary facts were ascertained by communal testimony on the ancient lines of the associations of shire, hundreds, and townships, they were recast into a new mould of manorial hierarchy," Vinogradoff, Manor 292; indeed, Sir Paul Vinogradoff thinks that, "besides the collection of geld, one of the purposes of the inquest was to provide the king's officers with exact clues as to the personal nexus of the different tenements," ibid; and see above 156-157.

[4] Vinogradoff, English Society 62-65, 409, 410; E.H.R. v 632, "In Northumbria we seem to see the new tenure by knight's service . . . superimposed upon other tenures which have been, and still are, in a certain sort, military. In Northumbria there are barons and knights with baronies and knights' fees; but there are also thegns and drengs holding in thegnage and drengage, doing the king's *utware*. . . . But . . . military service is not the chief feature of their tenure . . . they pay substantial rents, they help the king or their other lord in his ploughing and his reaping, they must ride on his errands. They even make fine when they give their daughters in marriage; they, these holders of whole manors and vills, of whose unfreedom there can be no talk, pay merchet;" at the time of the Conquest there were thegns and drengs on the lands of the monks of Canterbury, as they told Henry II., Robinson, Gavelkind 18; see Vinogradoff, English Society 336, 337, for other similar cases in England; for the meaning of the term "*utware*" see ibid 194.

But perhaps the best of all illustrations of the transition character of the period will be found in the manner in which the new military liabilities of the tenant by knight service were placed side by side with the old liability of all, and especially the landowner, to serve in the fryd[1]—just as the old liability to pay Danegeld existed, till 1162,[2] side by side with the new liability of the tenant by knight service either to perform his *servitium debitum*—to find, that is, his tale of knights—or to pay scutage. We still see that certain hides of land were liable to send a soldier to serve in the fryd, or to pay if they did not.[3] Side by side with this territorialized system of recruiting the national militia we see the special obligation of those to whom land had been granted on the terms of supplying so many knights to serve the king.[4] The fryd was a clumsy body; and even in Saxon times the need for a better equipped force had led to the growth of a military class specially bound by the terms upon which their land had been granted to them to serve in war.[5] There can be no doubt that the tenure by knight service of later law was introduced by William I. The military tenant owed by the terms of his tenure a *servitium debitum* of knights to the crown—generally some multiple of five or ten.[6] We can see from Henry I.'s charter that tenure by knight service with all its characteristic abuses is in full working order.[7] Thus we see side by side with the liability of all free men to serve in the fryd and the special liability of the owner of five hides to serve in the same force, the duty of the military tenant to send so many knights to the feudal levy.

In later law the duty of all subjects to serve in the fryd was placed upon a perfectly distinct footing by laws such as the Assize of Arms (1181) and the statute of Winchester (1285); and, when doctrines of tenure were elaborated and applied universally to the whole country,[8] the special duty of the owner of

[1] As Haskins, Norman Institutions 23, points out, "It is highly probable that the familiarity of the Norman kings with the *arrière ban* in the duchy made natural that preservation of the *fryd* which is usually set down to deliberate desire to maintain Anglo-Saxon popular institutions."

[2] Round, Feudal England 500.

[3] D.B. i 56 (Customs of Berkshire), "Si rex mittebat alicubi exercitum, de quinque hidis tantum unus miles ibat, et ad ejus victum vel stipendium de unaquaque hida dabantur ei iiii solidi ad duos menses. Hos vero denarios regi non mittebantur sed militibus dabantur. Si quis in expeditionem summonitus non ibat, totam terram suam erga regem forisfaciebat. Quod si quis remanendi habens alium pro se mittere promitteret, et tamen qui mittendus erat remaneret pro 1 solidis quietus erat dominus ejus."

[4] Round, Feudal England 306, 307.

[5] Vinogradoff, Manor 216-220; English Society 28-31; above 74.

[6] Round, Feudal England 246-262; cp. Haskins, Norman Institutions 7-9, 18, 19.

[7] Stubbs, Sel. Ch. 100-102.

[8] Below 199.

five hides to serve in the fryd must often have been merged in or exchanged for the duty of the tenant holding by military service to serve or send a knight.[1] No doubt there is a clear theoretical distinction between the two duties: the first is Saxon and dates from the reigns of the later Saxon kings: the second is Norman, and dates from the Conquest. The first is in the nature of a national obligation specially imposed upon the owners of five hides of land: the second is in the nature of a rent paid for land granted to be held on these terms. In the first case the summons came through the sheriff: in the second through the lord.[2] It may well be that their common feature—the connection between landowning and military tenure—helped to bridge the gap between the two ideas. That they did not become more clearly distinct in later law may be due to the early decay of tenure by military service.[3] At any rate, the manner in which we see them existing side by side at this period is an eloquent testimony to its transition character.

We can see, then, that tenure by military service has become a distinct tenure. But the other tenures of our later law hardly exist. In the *liberi homines* and *sochemanni* of Domesday we may see the germs of free socage tenure.[4] In the dependent classes who cultivate their lord's manor we may see the germs of villein tenure.[5] As yet, however, we see little more than germs or tendencies which require much manipulation at the hands of the royal judges before there can be developed from them the leading principles of the land law.

We see the same characteristics if we look at the law of procedure as it appears in the accounts which have come down to us of the cases litigated before the king and his court. In this period, as I have said, the king's court and the king's judges are concerned with great men and great causes; and it is for that reason that some record of them has been preserved. The methods of proof and the conception of a trial are the old methods and the old conception. The court still decides the question as to who is to go to the proof. The methods of proof are still the ordeal and compurgation, with the Norman addition of the battle.[6] But here perhaps we can see clearer symptoms of change than in other branches of the law. The principles upon

[1] See this point treated in detail in Vinogradoff, English Society 79-87; as he says at p. 79, "many of the institutional roots of Norman knight service have to be sought in the arrangements of Old English thanage;" cp. Red Book of the Exchequer (R.S.) ii clxi.

[2] Ballard, The Domesday Inquest 105. We may compare the perfectly distinct yet easily confused ideas underlying the heriot and the relief.

[3] Vol. iii 45.

[4] Ballard, The Domesday Inquest 161-164.

[5] Ibid 146-149, 160, 161.

[6] Vol. i 305-311.

which the proof is awarded often show that the court awards it upon a rational consideration of the facts and the evidence. Measures were sometimes taken to check or to test the results attained by the methods of proof employed. Thus in the case of *Bishop Wulfstan v. Abbot Walter*[1] (1077) the proof is awarded to the bishop because he has witnesses, whereas the abbot has none. In the case of *Modbert v. The Prior and Monks of Bath*[2] (1121) the court, having regard to all the circumstances of the case, requires the plaintiff to prove his case either by witnesses or a charter. The case of *Bishop Gundulf v. Pichot*[3] shows that the royal court was able to check and test the procedure employed. Pichot, the sheriff of Cambridgeshire, had made a grant of certain crown lands which were claimed by the bishop. It was left to the county to say to whom the land belonged. Intimidated by the sheriff, the county found for the crown. The Bishop of Bayeux, who was presiding, did not believe the county, and ordered that twelve selected persons should confirm the finding by their oaths. They did so confirm the finding. Afterwards a monk, by name Grim, who had been steward of the land, confessed the real facts to the plaintiff, Bishop Gundulf. He was sent to the Bishop of Bayeux, to whom he repeated his story. Thereupon the Bishop of Bayeux sent for one of the twelve who had confirmed the finding of the county. He confessed the perjury. Subsequently another made the same confession. These twelve and twelve others representing the county were ordered to appear in London. After a trial before the barons of England, the twelve who had confirmed the finding of the county were convicted of perjury. And, as the twelve representing the county could not clear themselves by the ordeal, they and the rest of the county were fined £300.

Side by side with these older ideas we meet the new ideas which were being introduced by the royal court. The more important suits were sometimes begun by royal writs. These Anglo-Norman writs are documents very similar in their character to the Anglo-Saxon writs.[4] In fact their form shows that they

[1] Bigelow, Plac. A. N. 16, "Tandem ex precepto justitiæ regis et decreto Baronum itum est ad judicium; et quia abbas dixit se testes contra episcopum non habere, judicatum est ab optimatibus quod episcopus testes suos nominaret et die constituto adducerent et per sacramentum dicti episcopi probarent et abbas quascunque vellet reliquias afferret."

[2] Ibid 114, "Considerantes totam hujus causæ circumstantiam hoc diffinientes statuimus, ut hæredem jure qui se nominavit id quod in assertionem suæ causæ ante declamavit, testibus ad minus duobus de ecclesiæ familia libere et legitime hodie nominatis et octavo productis, vel cyrographo credibiliter signato irrefragibiliter probat."

[3] Ibid 34; decided in William I.'s reign.

[4] For the Anglo-Saxon writ see above 77.

are the same documents translated into Latin.[1] What is new is the much greater use made of them, owing to the increase in the royal power which had come with the Conquest. It is not therefore surprising to find that these writs are like the Anglo-Saxon writs in the fact that they take the form of executive orders. As Maitland has pointed out,[2] some of the earliest of these writs, such as the writ of right and the writ of debt,[3] "are not in the first instance writs instituting litigation." Like the Roman Interdict, they simply contain a command that the person to whom they are addressed shall give up the land which the demandant alleges he has taken from him, or shall pay the sum which the plaintiff alleges to be due. "Only in case of neglecting to obey this command is there to be any litigation." Thus the cause of action is not simply the withholding of the land or the money, but the withholding of it in defiance of the royal command. It is this defiance of the king's command which makes the wrong of withholding the land or the money redressible in the king's court. "In the language of the old English laws there has been an 'overseeness or overhearness' of the king which must be amended;[4] the deforciant of land or of a debt has not merely to give up the land or pay the debt, he is at the mercy of our lord the king and is amerced accordingly."

As the king's court increased in strength, and royal justice came to be more and more common, this theory, on which its intrusion was once justified, dropped out of sight. This result has not yet been reached in this period—the laws of Henry I. enumerate among the pleas which belong to the king any case in which his commands have been broken;[5] but we can see the beginnings of the process which will lead to it. During this period the form of some of these royal writs is tending to become fixed. We have, for instance, several precedents which come very near to the forms of a writ of right.[6] Obviously, as the forms of these writs become fixed, they will tend to be regarded, not as royal commands to be literally obeyed, but merely as recognized modes of beginning litigation. In other directions also we can see that the procedure of the royal courts is making way. Thus, the procedure by sworn inquest is already being employed to

[1] Stevenson, E.H.R. xxvii 415.
[2] Maitland, Forms of Action 319-320.
[3] For the forms of these writs see Vol. i App. IV., V.
[4] Above 48.
[5] Above 48 n. 6.
[6] Bigelow, Plac. A. N. 99, "Henricus rex Angliæ, Jordano de Saccevilla, salutem. Precipio tibi ut plenum rectum facias Faritio abbati et ecclesiæ de Abbendonia de terra quam abstulisti eis, quam Radulphus de Caincoham dedit ecclesiæ in eleemosyna; et nisi sine mora feceris, præcipio quod Walterus Giffardus faciat, et si ipse non fecerit, Hugo de Bochelanda faciat, ne inde clamorem audiam pro recti penuria. Teste Gosfrido de Magnaville, apud Wodestoc." A.D. 1108(?); ibid 98, 130; cp. vol. i App. V.; and see Maitland, Forms of Action 314-315.

decide matters at issue in a lawsuit. In the case of *The Monks of St. Stephen v. The King's Tenants*[1] (1122) the verdict is found by sixteen men—a curious accidental anticipation of the number of recognitors of the Grand Assize.[2] We meet with fines "pro falso clamore,"[3] of a sheriff's return "non potest inveniri"[4]—phrases which will have a long history in the new system of royal justice.

In this period we are at a turning-point in the history of English law. We still see traces of old tribal divisions and old tribal rules—divisions and rules which an unmitigated feudal system would have modified, but perpetuated. But we can see also that a strong centralized court, in touch with the main currents of the intellectual life of Europe, is beginning to make some general rules for all England. As yet this strong centralized court is concerned mainly with things fiscal. The two great official documents which come to us from this period owe their origin to the necessity of organizing a sound system of finance. This, even at the present day, involves many legal questions; and, as we have seen, this is not an age in which we can make an accurate division into departments or functions of government. Land is the only property taxed; and land is not only the basis of taxation, but also, according to the prevalent feudal ideas of the day, the tie of all political and social relations. Thus we find that all questions relating to land are particularly interesting to the king's court. Again, if the property to be taxed is to maintain its value, if the taxes are to be peacefully collected, the state must keep order. The more serious classes of crime must be suppressed. The king's court must interfere to suppress serious crime, if for no other reason, in the interests of the revenue. Moreover, if this can be done efficiently some direct increase in certain sources of revenue will be secured. We have seen that in the Saxon period the more serious crimes were tending to be regarded as offences against the king's peace. He can claim a wite if they are committed. These rights of the crown are recorded in Domesday;[5] and the Pipe Roll of Henry I. shows that they were enforced.[6] We can see, therefore, that the king's court is beginning to have a definite relation to two of the most important branches of the law—the land law and the criminal law. But as yet the new machinery is comparatively

[1] Bigelow, op. cit. 119.
[2] Vol. i 328, and App. I.
[3] Pipe Roll 31 Henry I. 136.
[4] Ibid 97.
[5] See e.g. D.B. i 262b (Customs of Chester).
[6] 55 (Hunter's ed.) a payment of 40s. "pro rustico verberato;" fines pro placito damni 55, pro placito falsonarii 112, pro pace fracta 113, pro latrone quem celavit 73, pro assaultu navium et domorum Londoniæ 146, pro occisione 139, pro prisona qui aufugit 53, pro judicio de raptu 111."

untried. It requires the energy of strong kings to keep it moving. It is not as yet so perfect that it can run without friction by its own momentum for even a short period. If the reign of Henry I. had been followed by the reigns of a succession of kings of the character of Stephen, we should probably have had no centralized government and no common law. The country would have been ruled by many local customs; and when the need came for a more general law we should have absorbed, as continental states absorbed, the principles of the Roman civil law.[1] Fortunately the immediate successor of Stephen was as able a king as England has ever had. In Stephen's reign the life of the common law was in serious danger. Henry II. not only saved its life, but gave it so vigorous a constitution that its existence was never again imperilled.

II. The Reign of Henry II

Henry II. was not merely king of England. He was also a great continental potentate.[2] He ruled over more of France than the king of France; and the manner in which he organized and ruled his dominions enabled him to make his power felt throughout their wide extent. This he was able to do because he was one of the most enlightened of rulers. He made his court not only the centre of government, but also the centre of culture. He was, as Stubbs says, "by his very descent a champion of literary culture. Not to speak of his grandfather, Henry Beauclerc, whose clerkship was very probably of a very elementary sort, he was the lineal descendant of Fulk the Good, who had told King Lothar that rex illiteratus was asinus coronatus."[3] "In a later age," says Professor Haskins,[4] "he would have been called international, or even cosmopolitan, for he had wide ranging tastes, and knew the languages of the world from France to Syria." Peter of Blois speaks of the court and of the house of Archbishop Theobald as centres of literary culture. "In the house of my lord the archbishop are most scholarly men, with whom is found all the uprightness of justice, all the caution of providence, every form of learning. They, after prayers and before meals, in reading, in disputing, in the decision of causes, constantly exercise themselves. All the knotty questions of the

[1] Bk. iv Pt. I. c. 1.

[2] "Henry II. has too often been viewed merely as an English King, yet he was born and educated on the Continent, began to rule on the Continent, and spent a large part of his later life in his continental dominions," Haskins, Norman Institutions 156.

[3] Stubbs, Lectures on Mediaeval and Modern History, 136.

[4] Norman Institutions 156.

realm are referred to us, and, when they are discussed in the common hearing, each of us, without strife or objection, sharpens his wits to speak well upon them, and produces from a more subtle vein what he thinks the most prudent and sensible advice."[1] The man of letters and the man of action was often the same person. The best history of Henry II.'s reign was probably written by the author of the Dialogus de Scaccario, who was the treasurer of England and one of the early fathers of the Exchequer.[2] Hoveden could incorporate into his history the history of the treasurer and the work upon the laws of England written by or for Glanvil the justiciar.[3] Historians like William of Malmesbury, Henry of Huntingdon, and (in the thirteenth century) Matthew of Paris probably had recourse to semi-official registers of state documents, or even, through their friends, to the documents themselves.[4] For these reasons, both in this and the following period, the treatises of writers upon English law and government, and, in spite of Coke's warning, the writings of the chroniclers, must be reckoned as sources for the history of English law second only in importance to the recorded decisions of the royal court.

We may be certain that such men could not be unaffected by the new legal studies and the new legal literature which were arising in Europe. They could not help being influenced by the school of the Glossators, which was publishing the Roman law to the nations of Europe and adapting it to their needs. Glanvil[5] in this period and Bracton[6] in the next have many points in common with the representatives of that school. In both cases their work was lasting because they were no mere theorists. Acquaintance with practical life saved their writings from the vice of unreality; while their study of Roman law saved them from the mechanical formalism of the official or the practitioner. They happily combined practice and theory; and, as Savigny has said, upon the terms of the partnership depends the fate of both.[7] It was through the work of these men that the influence of the legal renaissance of the Continent made itself strongly felt in England. By their work and through that influence the foundations of the common law were so well and

[1] Cited Stubbs, Lectures on Mediæval and Modern History 164; see ibid 166-170 for an imaginary sketch of the kind of tour which a clerk of literary tastes might make in England of that day.

[2] Gesta Henrici (R.S.) i lvii seqq.

[3] Ibid lx-lxii.

[4] Red Book of the Exchequer (R.S.) i xx-xxxv; Mat. Par. Chron. Maj. (R.S.) v 627, Hist. Angl. (R.S.) ii 162, 182 (cited Red Book i xxx, nn. 1 and 4); Gesta Henrici (R.S.) i xviii.

[5] Below 188-192.

[6] Below 232-234.

[7] Savigny, History of Roman Law in the Middle Ages chap. xli.

truly laid that it rules to-day not only in England, but also in the many lands beyond the seas in which Englishmen have settled.

The Influence of Roman Law

During the twelfth century there are many proofs that the study of Roman law had become general. "Although Bologna and Paris could not be suffered to come to England, England might go to Bologna; and a stream of young archdeacons, at the age at which in England a boy is articled to an attorney, poured forth to the Italian law schools. Many and varied were their experiences . . . all more or less illustrate the scholastic question which John of Salisbury propounds, Is it possible for an archdeacon to be saved?"[1] Literary allusions to its principles are common.[2] Walter Mapes, in his poem on the last judgment, refers to the Code and the Digest. John of Salisbury in his Polycraticus devotes two chapters to a sketch of certain Roman rules of procedure.[3] Works on the civil law find their place in monastic libraries;[4] and we get from this period certain tracts upon procedure—which may well have inspired Glanvil's treatise—written either by Englishmen or Normans. Among these tracts the following are noteworthy: An *Ordo Judiciorum* known as the *Ulpianus de Edendo*, written about 1150;[5] an *Ordo Judiciarius Bambergensis* dealing with the canon law;[6] a tract on procedure written by Richard I.'s justiciar William Longchamp;[7] and another known as the *Olim*, attributed to Richardus Anglicus, who, it is said, is the Richard le Poore who became Bishop of Durham.[8] In 1208 no less a person than Innocent III. testified to the prevalence of legal studies in Normany;[9] and, as we have seen, the relations between the learned and the literary men of England and Normandy were peculiarly close. In fact,

[1] Stubbs, Lectures on Mediæval and Modern History 349; cp. Haskins, Norman Institutions 330.

[2] P. and M. i 99, 100; Caillemer, op. cit. 12; Duck, De usu et auctoritate juris civilis Bk. ii c. 8 Pt. II. § 31.

[3] Bk. v cc. 13, 14.

[4] P. and M. i 100.

[5] Caillemer, op. cit. 16-20; for another similar tract *de actionum varietate* see ibid 20-24.

[6] Ibid 24-29—there was also a similar tract known as the *Summa decreti*.

[7] *Practica Legum et Decretorum edita a magistro W. de Longo Campo*, printed by Caillemer 50-72; Vinogradoff, Roman Law in Mediæval Europe 87; for Longchamp see Stubbs, Introd. to Hoveden (R.S.) vol. iii.

[8] Caillemer, op. cit. 31-39; P. and M. i 101 and n. 2. Others think that the author is another Richard who was magister decretorum at Bologna.

[9] The Bishop of Bayeux had asked the pope some elementary questions in law. The pope replied, "Cum in jure peritus existas, et copiam habeas peritorum, non possumus non mirari quod super quibusdam juris articulis nos consulere voluisti, qui nihil aut modicum dubitationis continere noscuntur," cited Caillemer 40, 41.

from this century onwards the civil and canon law were studied, and degrees in them were conferred both at Oxford and Cambridge. Degrees in civil law are still conferred; but, as we have seen, the degrees in canon law ceased to be conferred at the time of the Reformation.[1] We shall see that after the end of the thirteenth century the study of the civil and the canon law ceased to influence directly the development of English law. But up to that period their influence was direct. So great was their influence, so speedily did English lawyers, at the head of a strong royal court, impart to the customary law of England the essence of what they had learned, that they were able to construct a system which could stand without foreign aid.

I have already indicated in general terms what was the nature of that influence.[2] The judges who presided in the royal courts were generally churchmen. Then, as in later days, the revenues of the church were used to aid the civil list. As churchmen they were obliged to know something of the canon law. The canon law owed much to the civil law; and, as the literary efforts of Vacarius show, during the earlier part of the period civilians and canonists were not so markedly rivals as they afterwards became. The royal judges, therefore, brought to the task of declaring the custom of the king's court some knowledge of a body of law the rules of which were logically coherent, the expression of which was precise and clear.[3] This training in method and principle enabled them to construct a rational, a general, a definite system of law out of the vague and conflicting mass of custom, half tribal, half feudal, of which the English law consisted. How far there was a conscious replacement of native rules by foreign; how far there was simply the inevitable attraction exercised over the minds of men, accustomed to reverence authority, by a system which seemed to provide in advance for the new problems set by the advancing civilization produced by a more settled government, it is difficult to determine. I shall deal more in detail with the process when I speak of the works of Glanvil and Bracton.[4] Here I need only say that the ease

[1] Vol. i 592; Bk. iv Pt. I. c. 1; Stubbs, Lectures on Mediæval and Modern History 380; and cp. Maitland, English Law and the Renaissance 47. For an attempt to take a degree in canon law at Oxford about the year 1715, see Stubbs ibid 381.

[2] Above 146, 175-176.

[3] P. and M. i 111-114; Bracton's Note Book i 9; Scrutton, Roman Law in England 78-121. Selden well expresses the service rendered by Roman law: "Sed ita jam receptum fuisse juris Justinianei usum, ut quoties aut interpretandi jura sive vetera sive nova sive ratio sive analogia desideraretur, aut mos aut lex expressior non reperiretur, ad jus illud Justinianeum tum *veluti rationis juridicæ promptuarium optimum ac ditissimum*, tum ut quod legem in nondum definitis ex ratione seu analogia commode suppleret, esset recurrendum," Diss. ad Fletam vi § 4.

[4] Below 202-206, 267-286.

with which the older law was swept away and replaced by the new rules should not surprise us. Both India and Japan in our own days illustrate the influence, partly conscious, partly unconscious, which a finished body of law has upon the vague and shifting customary rules of a primitive society.[1] And we should remember that, throughout this mediæval period, the Roman law, civil or canon, exercised a stronger influence than, in modern times, European law could exercise upon India or Japan. Both in India and Japan the people retained their original religious beliefs and intellectual ideas; so that the influence exercised by European law was merely a legal influence. On the other hand, throughout Western Europe in the Middle Ages, men's religious beliefs and intellectual ideas were founded upon those legal ideas which were set forth in the civil and canon law; so that the influence of the civil and the canon law was far more than a merely legal influence. There is little reason, therefore, to be surprised at the rapidity and magnitude of the results achieved by the renaissance of the study of the civil law and the rise of the system of the canon law.

The Native Sources of the Law

I shall deal with the native sources of the law under the following heads: (i) the enacted law; (ii) the records of the Curia Regis; and (iii) connected treatises. The first of these sources is, as in the preceding period, the least in bulk. But it is by no means the least in importance, for on it rested some of those legal institutions by means of which a common law was created, and through which it did its appointed work. The second of these sources is by far the greatest in bulk, and contains by far the most important of the first hand materials for the history of English law. This importance it retains till the Year Books begin in Edward I.'s reign. From the third of these sources we get a valuable account of the working and methods of the Curia Regis, and a striking proof of the rapid growth of an orderly system of law.

[1] Maine, Village Communities 74-76; for Japan see L.Q.R. xxiii 44, 45, Mr. Munroe Smith says, "The Japanese imperial legislation of the closing decades of the nineteenth century, culminating in the civil code of 1898, has effected a sweeping reception of West European Law." In this reception, "it is interesting to observe that, as in the reception of the law-books of Justinian in mediæval Europe, the completed formal reception was preceded by a theoretical or scientific reception. . . . In the first stage the schools took the leading part. Japanese students absorbed foreign law at Paris and at the English Inns of Court, at Leyden, Leipsic, and Berlin, just as the North Europeans some centuries earlier had absorbed Roman law at Bologna and other Italian universities."

(i) The enacted law.

Of the enacted law I have already said something; and it will therefore only be necessary to catalogue the enactments which have come down to us. Some of these are recent discoveries, so that it is very probable that there are others which have been lost.[1]

In 1164 there were passed the Constitutions of Clarendon to settle the controverted question of the relations of church and state.[2] In 1166 and 1176 there were issued, in the form of instructions to the itinerant justices, the Assizes of Clarendon[3] and Northampton;[4] and a somewhat similar document, under the title of capitula coronæ regis, was issued in 1194.[5] In 1170 there was issued the instructions for the inquests who were to inquire into the misdeeds of the sheriffs.[6] In 1181 the Assize of Arms provided for the organization of the police and defence of the country.[7] This enactment was enforced by a proclamation for the preservation of the peace, issued in 1195,[8] which provided for the appointment of knights to swear all subjects of fifteen years of age and upwards to keep the peace. In 1184 there was issued an Assize of the Forest, which laid down certain rules as to the laws which were to be observed in the Forests.[9] In 1188 came the ordinance of the Saladin Tithe, which is one of the first attempts to tax personal property through the machinery of an inquest of neighbours.[10] Of uncertain date are the important enactments which established the control of the king's court over the land law—the Grand Assize,[11] the possessory Assizes of novel disseisin mort d'ancestor and darrein presentment, and the Assize Utrum.[12] One other unimportant enactment of uncertain date is an Assize of Bread.[13]

These enactments show us that the four legal topics with which the Curia Regis is chiefly concerned are (1) the due regulation and supervision of the conduct of the local government of the country;[14] (2) the repression of serious crime;[14] (3) the ownership and possession of land held by free tenure;[15] and (4) the

[1] P. and M. i 116.

[2] Sel. Ch. 137-140; vol. i 615; for the "Norman prologue to the struggle between Henry II. and Becket" see Haskins, Norman Institutions 170 seqq., 329-333.

[3] Sel. Ch. 143-146; vol. i 50.

[4] Sel. Ch. 150-153; vol. i 50.

[5] Sel. Ch. 259-263; vol. i 50-51.

[6] Sel. Ch. 148-150.

[7] Ibid 154-156.

[8] Ibid 264.

[9] Ibid 157-159.

[10] Ibid 160.

[11] Vol i 327-329; as to the date see ibid 327-328.

[12] Ibid 329-330.

[13] P. and M. i 117; printed by Cunningham, Industry and Commerce i 567.

[14] The Assizes of Clarendon and Northampton, the Inquest of Sheriffs, the capitula placitorum Coronæ Regis.

[15] The Grand Assize and the Possessory Assizes.

relations between the lay and the ecclesiastical courts.[1] These are the earliest branches of the common law. It would not perhaps be correct to say that they are the only branches; but they are by far the most important. We cannot, as I have said, be sure that we have all the legislation of the period. Administrative and legislative acts shade off into one another;[2] and both might be quite informal. The legislative acts which we possess are not in their original form. As with many later legislative acts, they have become incorporated into the body of the law, and their original form is, perhaps, not practically important.[3] However, the conclusions which we can draw from the extant legislative acts of the period as to the branches of the common law which were the first to attain importance are borne out by the other sources of this period.

(ii) The Records of the Curia Regis.

We have seen that our earliest records are the Pipe Rolls of the Exchequer.[4] The man who first introduced into the Exchequer a systematic method of enrolment was perhaps Richard of Ilchester, archdeacon of Poitiers and afterwards Bishop of Winchester.[5] The writer of the Dialogus tells us that it was his skill in these matters which gave him his place at the Exchequer beside the treasurer.[6] The plea rolls of the Curia Regis begin in 1194;[7] and we have seen that in 1199 the Chancery—the secretarial department—became distinct from the Exchequer, and began to keep separate rolls.[8] In fact, from the last years of the twelfth and the early years of the thirteenth centuries we can trace the beginnings of the various series of rolls upon which the business of state is recorded day by day from then until now. New departments of state, and the subdivision of old departments, demanded new rolls and records, so that their mass and complexity have grown with the growing complexity of the state. The gradual and haphazard growth of the organization of government was, until the last century, reflected in the want of measures to safeguard and arrange these records. Some account of the

[1] The Constitutions of Clarendon and the Assize Utrum.

[2] Thus Glanvil ii c. 12, mentions "quædam constitutio ex æquo prodita," which limits the number of essoins open to the tenant in different stages of the trial by Grand Assize; ibid iv 10, a law with regard to clerks actually in livings on the presentation of persons who, without right, presented "tempore guerræ."

[3] Below 223.

[4] Above 165-166.

[5] Dict. Nat. Biog.

[6] Dialogus 77, "Hic ante tempora promotionis dum paulo inferior in regis curia militaret, visus est fide et industria negotiis regis necessarius et in computationibus atque in rotulorum et brevium scripturis satis alacer et officiosus. Unde datus est ei locus ad latus Thesaurarii ut scilicet scripturæ rotulorum et hiis omnibus cum ipso intenderet."

[7] Below 185-186; cp. Poole, The Exchequer in the Twelfth Century 187.

[8] Vol. i 37-38.

general history of these records — the first-hand materials for all branches of English history—will be found in the appendix.[1] Here I must say something of those series most nearly affecting legal history which take their rise in or about this period. Later records of importance to the legal historian will be mentioned in succeeding chapters.

The following are the classes of records which are of the greatest importance to the historian of English law.

(*a*) *Rolls connected with the Exchequer business.* I have already noticed the Pipe Rolls and the Chancellor's Rolls.[2] From the reign of John onwards[3] we get a large number of varied rolls as the business of this department increased and became more definitely organized. There are (1) the Memoranda Rolls (1199-1848).[4] They were compiled by the king's remembrancer and the treasurer's remembrancer.[5] These officials prepared the business which was to be brought before the barons of the Exchequer, and so "reminded" them of the matters with which they must deal. (2) From 1236-1837 we have the Originalia Rolls, in which were recorded the estreats or extracts transmitted from the Chancery to the Exchequer.[6] (3) The Liberate Rolls (1201-1436) contain the list of writs of Liberate, Allocate, and Computate issued by the Chancery.[7] (4) The Præstita Rolls (1199-1603) contain the list of payments advanced to royal officials.[8] (5) The Wardrobe and Household accounts[9] (1199-1816) contain the accounts of the king's personal expenses, as well as payments made on account of the army, navy, and civil service. (6) The Receipt Rolls, containing an account of the money received, were in use from the reign of Henry II. to that of Henry III. They were superseded by the Pells of Issue and Receipt, which were journals of daily expenditure and receipt.[10] (7) Scutage Rolls (1215-1347) contain the accounts of the scutage; and there are other later subsidy rolls which contain the accounts of later forms of direct taxation.[11]

(*b*) *Chancery enrolments.*[12] The most important of these enrolments are the Charter, Patent, and Close Rolls. The kings of

[1] App. I.
[2] Above 165-166.
[3] Tout, Edward II. 54-55.
[4] Scargill-Bird, Guide 56.
[5] As to the duties of the remembrancer see Red Book of the Exchequer (R.S.) iii 863-887.
[6] Scargill-Bird, Guide 56, 329.
[7] Ibid 42; for these terms see vol. i 43.
[8] Scargill-Bird, Guide 44.
[9] Gross, Sources 333; Scargill-Bird, Guide 359-360.
[10] Gross, Sources 331; Scargill-Bird, Guide 299, 300, 306, 313. Pells of Issue extend from 6 Henry III. to 19 Edward IV., and from 9 Elizabeth to 1797; the Pells of Receipt extend from 1213 to 1782.
[11] Scargill-Bird, Guide 347.
[12] Gross, Sources 363, 364; Scargill-Bird, Guide 33-39.

England did much of the business of state by means of charters, letters patent, and letters close. "By the first their more solemn acts were declared, by the second their more public directions were promulgated, and by the third they intimated their private instructions to individuals." We find in them matters relating to all departments of government. Their contents relate to domestic matters and to foreign relations. Royal charters and letters patent are often similar in their contents. They differ only in their form.[1] The Charter Rolls extend from 1199-1515; after that dates all grants were made in the form of letters patent. The Patent Rolls extend from 1202 to the present day.[2] The Close Rolls extend from 1205 to the present day. They were commands addressed to one or more specified individuals, closed and sealed.[3] Another species of Chancery Rolls are the Fine or Oblate Rolls (1199-1641).[4] They contain records of payments made to the king by way of oblate or fine for the grant of privileges or by way of amercement for breach of duty. We have seen that in the earlier period of our history most privileges could be bought with a fine, and that for any kind of governmental interference a fine was expected.[5]

(*c*) *Records relating to Land Tenure.* I have said that the Domesday survey was only the first of the many and varied inquisitions undertaken by the active government of the Norman

[1] The charters are addressed to the archbishops, bishops, earls, barons, etc., and are executed in the presence of witnesses: letters patent are addressed "to all to whom these presents come," and are generally witnessed by the king himself.

[2] "During the reigns of the Plantagenets the Patent Rolls contain documents of a most diversified and interesting nature, relating principally to the prerogatives of the crown, to the revenue, and to the different branches of judicature"—they relate also to foreign affairs, and contain also grants and confirmations of offices and privileges, charters, pardons, proclamations, and commissions, Scargill-Bird, Guide 34, 35.

[3] Close Rolls (R.C.) Introd. They also contain information of a most varied nature—"orders for the observance of treaties and truces, orders concerning aids, subsidies, tallages, restitutions of possessions, assignments of dower, and acceptances of homage; for the repairing, fortifying, and provisioning of castles; writs and mandates respecting coin of the realm, the affairs of the royal household, and the payment of salaries and stipends; commitments, pardons, and deliveries of state prisoners, etc. On the back of the rolls are summonses to and prorogations of Parliaments, Great Councils, and convocations; writs of summons for the performance of naval and military services; copies of letters to foreign princes and states; proclamations; prohibitions; orders regulating the sale of wine and other necessaries, for receiving knighthood, providing ships, raising and arraying forces, and furnishing provisions; for paying knights, citizens, and burgesses for attendance in Parliament; liveries and seisins of lands; enrolments of private deeds, of awards of arbitrators, and of various other documents."

[4] Scargill-Bird, Guide 37, 38.

[5] Vol. i. 48. We may also mention among these rolls the Cartæ Antiquæ. They are the most ancient records of the Chancery, and consist of transcripts of the twelfth and thirteenth centuries, of grants and charters of various dates from the reign of Ethelbert to Edward I., Scargill-Bird, Guide 39.

and Angevin kings.[1] In fact, the assumption made by the Domesday commissioners that all land was held of some one had introduced one simple conception in place of the many competing principles which underlay the various forms of dependency to be found in the Anglo-Saxon laws. Though, as we have seen, the Domesday survey was primarily made with a view to the better assessment of Danegeld, yet its underlying assumption of the principle "nulle terre sans seigneur" "involved the reconsideration and resettlement of all ties and relations connected with the land from the point of view of tenure and service," and "the admeasurement and exaction of service were sure to follow."[2] Thus we have in the formal returns (cartæ) made by the tenants-in-chief to the Exchequer in 1166, the answers to an enquiry into the organization and working of tenure by knight service.[3] The enquiries of 1166, to which these returns were an answer, were made with a view to the better assessment of the *servitium debitum*—the military service due from the fiefs of the tenants-in-chief. Between the two inquisitions we see a great step forward in the direction of feudalizing and simplifying the land law. Mr. Round brings out this point very clearly.[4] "The original returns of the Domesday inquest were made hundred by hundred; those of 1166 were made fief by fief. The former were made by the jurors of the hundred court; the latter by the lord of the fief. Thus while the one took for its unit the oldest and most familiar of native organizations, the other, ignoring not only the hundred, but even the shire itself, took for its unit the alien organization of the fief. The one inquest strictly continued, the other wholly repudiated, the Anglo-Saxon system." The questions which the crown addressed to the tenants-in-chief were the following: (1) How many knights have been enfeoffed before the death of Henry I.; (2) how many have been enfeoffed since; (3) how many more (if any) will it be necessary to enfeoff to make up the number of knights due from the fief; (4) what are the names of the knights?[5] The object of these questions was to obtain a basis for "a new feudal assessment."[6] If the tenant had created no more new fees he still paid as before. If he had created more, his *servitium debitum* was proportionately raised. Thus the servitium of the Bishop of Durham was raised from 10 fees to over 70.[7] The king intended that he, and not his

[1] Above 155.
[2] Vinogradoff, Manor 295.
[3] Transcripts of these returns are in the Red and the remembrancer's Black Books of the Exchequer, below 224-226.
[4] Round, Feudal England 236. See also Eyton, Itinerary of Henry II. 90, 91.
[5] Round, Feudal England 237-239.
[6] Ibid 242.
[7] Ibid 246.

tenants, should profit by any increase in the capacity of the land to support knights.

This inquest was but the first of several inquisitions undertaken with the object of ascertaining the king's feudal rights to service or to the incidents of tenure. In 1185 we have an enquiry into the king's rights to wardship and marriage.[1] In Edward I. or II.'s reign we have the Testa de Nevill[2] or Liber Fœdorum. It is a register compiled from inquisitions as to knights' fees, serjeanties, and incidents of tenure, with a view of enabling the crown to exact its feudal dues. The greater part of the material comes from the first half of Henry III.'s reign; but it includes inquisitions taken in Richard I. and John's reigns. A similar record is that known as Kirkby's Quest, probably compiled in 1284-1285 by John Kirkby, the treasurer.[3] Mention, too, should be made of the rolls of the Inquisitions Post Mortem[4] (Henry III. to Charles II.), the records of enquiries held by the escheator of each county on the death of any tenant-in-chief in order to ascertain the king's rights to relief, wardship, or escheat; and we may remember that the Hundred Rolls gave the king much information as to his feudal rights, both jurisdictional and proprietary,[5] and much information as to the conduct of royal and seignorial officials and of other persons who took part in the work of local government.[6]

Above all, we must not omit to notice the series of "Feet of Fines," which stretch in a continuous series from July 15, 1195 (the date when Hubert Walter devised the form of engrossing fines in triplicate so that the third copy should remain in the Treasury as a permanent evidence of the transaction) to the sixth year of William IV.'s reign. They are, as Maitland has said, "the best illustration that we have of mediæval conveyancing."[7]

[1] The Rotulus de dominabus pueris et puellis, containing an account of wardships, reliefs, and other profits due from widows and children of tenants-in-chief, Scargill-Bird, Guide 119.

[2] It is not certain whether this Nevill is Ralph Nevill, an Exchequer officer of Henry III., or Jollan Nevill, an itinerant justice of the same reign, or John Nevill, an official of Edward I.'s reign. The word Testa or Cesta refers to the chest in which the records were preserved, Gross, Sources 378; Scargill-Bird, Guide 118.

[3] Ibid 117.

[4] Ibid 144. These rolls cease with the abolition of the court of Wards and Liveries in Charles II.'s reign. A record of a similar nature is the book of Aids compiled to levy the aid on the knighting of the king's eldest son (20 Ed. III.) and on the marriage of the king's eldest daughter (3 Hy. IV.), ibid 117.

[5] Vol. i App. XIXA.

[6] Miss Cam, Vinogradoff, Oxford Studies vi 114-138, has given the first critical account of the various documents comprised in these rolls, and of the relation of these inquests to the general Eyre.

[7] P. and M. ii 97; Scargill-Bird, Guide 122-125; vol. iii 236-245. Some of the earliest fines have been printed under the editorship of Hunter for the Rec. Com.; others still earlier by the Pipe Roll Soc.; cp. E.H.R. xii 293.

(*d*) *The Plea Rolls.* For the purposes of this early period in our legal history the records of the most importance are the Plea Rolls. A Plea Roll consists of a number of membranes filed together at the top.[1] The earlier rolls are untidy and clerically incorrect. One clerk will report one set of facts, and another another set. Maitland tells us of a "gay clerk" of John's reign who finished off a list of essoins with the words, "Omnia vincit amor et nos cedamus amori."[2] But, "on the whole the art of recording grew apace; a roll from the middle of the thirteenth century is very unlike a roll from the beginning—far neater, fuller, more regular, more mechanical; the rapid development of the common law is mirrored on the surface of the rolls."[3]

The rolls of Richard and John's reigns were contained in a single series known as the *coram rege* rolls. The rolls of Henry III.'s reign were in three series—the coram rege rolls, the assize rolls, and the Tower assize rolls, or Tower coram rege rolls. The arrangement into these three series was based upon the fact that some of the rolls were kept in the chapter house at Westminster, while others were kept at the Tower.[4] A better classification, based upon the court before which the case was heard, has recently been adopted. For all these three reigns there are two series of rolls—(1) The Curia Regis Rolls, consisting of cases heard before the bench or coram rege; and (2) the Assize Rolls, consisting of cases heard before the itinerant justices.[5] In later days each of the courts of common law kept separate rolls, and there are also separate rolls of the cases heard before the justices of assize.[6] Like the rest of the Public Records, these rolls have had a curious history. It was not till 1857 that they found a single permanent home in the Public Record Office.[7]

Some of the earliest of these rolls are already in print. The Record Commission has printed the rolls of the Curia Regis from 6 Richard I. to 1 John. The Pipe Roll Society has edited the rolls of the Curia Regis of 1194-1195, and has published an undated roll of Richard I.'s reign. All these works are printed

[1] They thus differ from the Chancery Rolls, which consist of a continuous strip of parchment made by sewing the membranes together at the top, Select Pleas of the Crown (S.S.) ix, x.

[2] Ibid.

[3] Ibid x.

[4] Ibid x, xi.

[5] Select Civil Pleas (S.S.) x, xi.

[6] For a history of the rolls of the court of Common Pleas see Y.B. 18 Ed. III. (R.S.) xviii-xxx; for the double set of rolls in that Court—the King's Roll and the Justices' Roll, see Y.B. 16 Ed. III. (R.S.) ii xxv-xxix; for the differences between them see Y.B. 5 Ed. II (S.S.) xii-xiv; it appears that the King's Rolls, unlike the Justices' Rolls, are in a very bad state of preservation; Mr. Bolland, ibid xv, conjectures that these rolls were made for the purpose of immediate deposit in the Treasury, and that when the Justices' Rolls were returned there the King's Rolls became useless and were therefore neglected.

[7] See App. I.

with the original abbreviations, and are not translated. The Selden Society has printed a selection of civil pleas of the years 1200-1203, and a selection of pleas of the crown of the years 1200-1235. The text of these two volumes is translated, and the latter volume is printed without abbreviations. Maitland has printed in extenso and edited the pleas of the crown for the county of Gloucester of the year 1221. Mention should also be made of an old collection of cases made in 1619 and finished in 1626, and styled *Abbreviatio Placitorum.* The cases are abbreviated from the rolls of the reigns of Richard I. to Edward II. Though the cases abbreviated are not always the most interesting, though important parts of the case are omitted, and though the work is not always accurate, the collection is useful in the absence of anything like an index to the rolls.[1] The work was printed in 1811 by the Record Commission.

These Plea Rolls contain the only first-hand information which we possess of the actual working of the Curia Regis in its early days. The cases there decided are the earliest authoritative statements of the common law, the earliest illustrations of its practical working.

(iii) Connected Treatises.

The strong administration of Henry II. had created a class of civil servants, generally in orders, always in touch with, and in some cases the leaders of, the literary society which adorned his court.[2] The Dialogus de Scaccario[3] and the work attributed to Glanvil illustrate and co-ordinate the scattered information we get from the rolls. They testify to the scope and permanence of Henry's work, to the enthusiasm and abilities of his servants. They show that he had created an administrative machine which could run smoothly even during the long absences of its chief.

The Dialogus was written by Richard, Bishop of London[4]—

[1] Select Civil Pleas (S.S.) xii, xiii. The date of the collection is fixed by the fact that the abbreviator marked each roll, as he finished, with the date at which he made his abbreviation. This shows that the MS. (so far as John's reign goes) was not compiled, as the introduction of the R.C. edition says, in Elizabeth's reign. In that introduction the collection is assigned to Agarde, and other keepers of the Records in Elizabeth's reign. For a general account of the work done in the nineteenth century upon records and MS. materials see Maitland, Collected Papers ii 40-42.

[2] Above 174-175.

[3] My references are to the edition of the Dialogus by Hughes, Crump, and Johnson published by the Clarendon Press in 1902. For a short account see P. and M. i 140, 141; and for the Exchequer itself vol. i 42-44. The proper name of the treatise—that given by its author—is "de necessariis observantiis scaccarii." The usual name is due to a misunderstanding of the title-page of Madox's edition.

[4] P. 97, "Hic etiam, ab illustri rege Henrico secundo frequenter rogatus, scaccarii scientiam continuata per multos annos bellica tempestate pene prorsus abolitam reformavit, et totius descriptionis ejus formam velut alter Esdras bibliothece sedulus reparator renovavit."

the Esdras of the Exchequer and the son of Nigel, Bishop of Ely—between the years 1177 and 1179.[1] This Nigel was the son or the nephew of Roger, Bishop of Salisbury, and the brother of Alexander, Bishop of Lincoln; so that the author belonged to a family which had for two generations been connected with the administration of the central government.[2] The treatise exhibits in its minutest particulars the working of the Exchequer—the centre of the Norman administration—and shows that the government of Henry was strong enough to bear publicity. It gives us, as we might expect, valuable sidelights upon law from the financial point of view. The varied sources of revenue for which the sheriff must account leads the author to tell us something of the Danegeld, of scutage, of murder fines,[3] of escheats of land and the king's rights to chattels,[4] of reliefs,[5] and wardship.[6] We learn something of the law of distress in the discussion as to the measures taken to enforce payment. We have some old traditions preserved of the ancient methods of payment in kind, and of the modern precautions taken to get payment in good money of the true standard.[7] We have some information of what was then doubtless the official view of the effect of the Conquest upon the humbler classes of society, and of the compilation of Domesday Book.[8] Upon such matters the authority of the writer is not so good as upon what to him were the important parts of his treatise, the details of the practice of the Exchequer. This was the practical information which his book was written to convey, which made it valuable for many years to come.[9] The merely historical parts were probably regarded by him as literary padding inserted to make the book less dry reading, like the quotations from Horace and Virgil, or the conventional preface taken from

[1] "The first book opens with the words, 'In the twenty-third year of the reign of king Henry II. while I sat at the window of the tower which is by the river Thames,' on the east side of Westminster Hall. This gives the year ending, according to the Exchequer rule at Michaelmas, 1177. But later on the author mentions a provision made by the king at Michaelmas, 1178, so that either the composition of the work was not finished till after that date, or else the passage is a later insertion. In any case the work was completed before the spring of 1179, for it mentions the division of England for judicial purposes into six circuits, and before Whitsuntide in that year the king altered the number to four," Poole, The Exchequer in the Twelfth Century 8, 9.

[2] Pp. 9, 10. He was born in 1133, and was certainly treasurer in 1160. He held the office till his death in 1198; for his authorship of the Gesta Henrici see above 175.

[3] 98 seqq. [4] 133, 135, 136, 140. [5] 134, 135.

[6] 133—using the expressive term "escaeta cum herede." Nothing curiously is said of the incident of marriage.

[7] Introd. 31, 32, and 89-91. [8] 107, 108.

[9] Introd. 8. "Every early MS. of the treatise is entered in a book showing close connection with the Exchequer. It may easily be affirmed, therefore, that these copies were always made by and for Exchequer officials."

the preface to the Institutes.[1] Then as now the practical solution of contemporary problems was more interesting to Englishmen than scientific enquiries into the details of past events.

The book shows the vast strides which the government and law of England had made in Henry II.'s reign. The writer does not conceal his view that all is due to the king. The passages in which the king is thus praised are not couched in the style of merely official compliment—they speak the honest admiration of the able man who can from his own knowledge compare the present with other days.[2] From one point of view the book is an excellent appendix to the plea rolls. We see the sheriffs obliged to account strictly for the various fines and forfeitures to which the administration of justice gives rise.[3] But from another point of view it is much more than this. All the chief officials of the kingdom, as we have seen, took their places at the Exchequer.[4] We see depicted the governing body of the kingdom, the body which supervised the local government at the half-yearly audit, which sent the itinerant justices round the country year by year, which decided cases, which passed laws, working smoothly under fixed rules of practice. That this account of its working is not a mere exaggeration of an Exchequer official is clear from the fact that this administrative system stood the test of an absent king, a bad king, and an infant king. Indeed, the fact that the Dialogus could be written is an all-sufficient explanation of the fact that England obtained a common law.

The treatise attributed to Glanvil deals more directly with the legal side of Henry's administration. I shall say something, firstly of Glanvil's life, and then of the treatise itself.

Ranulf de Glanvil [5] first comes into public notice as sheriff of Yorkshire between 1163 and 1170. In the latter year Henry removed all the sheriffs from their offices and instituted an enquiry into their doings. He was sheriff of Lancashire in 1173; and in 1174 was one of the leaders of the English army which defeated the Scots at Alnwick. After this victory he again became sheriff of Yorkshire, and was for some years also sheriff of Westmoreland. He served the king as justice in eyre in 1176 and 1179, as ambassador to the court of Flanders in 1177, and in 1180 he was a member of the king's permanent court which was formed in

[1] As to the author's literary equipment see Introd. 10, 11. The authors consider him rather "an educated Churchman" than a "profound scholar." He was "a man of affairs, liberally educated, and knowing enough to do his work intelligently."

[2] At pp. 118-120. [3] At pp. 135, 136.

[4] Vol. i 43-44.

[5] P. and M. i 141-143; Dictionary of National Biography. Glanvil's book was printed without date in 1554; later editions appeared in 1604, 1673, 1780; and an Engl. tr. by Beames in 1812. A new edition is wanted.

1178.[1] In 1180 also he became justiciar of England; and in that capacity he assisted the king not only as counsellor and judge, but also as a general in the Welsh wars and in the wars against the king's rebellious sons. Though Richard obliged Glanvil to pay a large sum on his accession, he was either deposed from or resigned the office of justiciar. But Richard still made use of his services; and he accompanied the king on his crusade. He died at Acre in 1190. As Henry's prime minister during the latter part of his reign he was the person who carried out, and perhaps suggested, some of Henry's legal reforms. He is said to have been the inventor of the assize of novel disseisin and the action of replevin.[2] But, as we have seen, he was much more than a lawyer. Indeed, the legal learning of his nephew and secretary, Hubert Walter, afterwards Archbishop of Canterbury, chancellor, and justiciar, may have assisted to give to Glanvil his legal reputation. There is one story against him which, if true, leaves a deep stain on his memory. It is said that he tried to pervert the law in order to satisfy a private grudge against one Gilbert de Plumpton.[3] But, however that may be, he was certainly one of the foremost of the band of statesmen and lawyers who shed lustre on the reign of Henry II.—who were the founders of the common law.

His legal reputation rests upon his book, which is the earliest treatise on the common law. Whether he actually wrote the book may well be doubted. Hoveden does not state this in so many words;[4] and the book itself simply states that it was written while he was justiciar.[5] In the thirteenth century it was known as the "Summa quæ vocatur Glannvile."[6] It does not speak with the tone of authority which we might expect from Henry's prime minister. Moreover, it was not finished till after 1187;[7] and during the latter years of the reign Glanvil was fully employed. There is therefore considerable probability in the conjecture that it was written by Hubert Walter, but with

[1] Vol. i 51, 52; P. and M. i 133.

[2] Mirror of Justices Bk. II. cc. 25, 26; but the statements made by this work are not entitled to much credence, below 327-333.

[3] Benedictus Abbas (R.S.) i 314.

[4] Hoveden ii 215 s.a. 1180 mentions Glanvil's appointment as justiciar, and then states that by his wisdom "conditæ sunt leges subscriptæ quas Anglicanas vocamus" —then follow the Leges Wilelmi, Leges Edwardi, this treatise, and certain assizes of Henry II. Clearly the word "conditæ" cannot be made with any certainty to refer to authorship.

[5] "Tractatus de legibus et consuetudinibus regni Angliæ, tempore regis Henrici secundi compositus, Justiciæ gubernacula tenente illustri viro Ranulpho de Glanvilla juris regni et antiquarum consuetudinum eo tempori peritissimo."

[6] Maitland, Glanvil Revised, H.L.R. vi 1-20—a description of a revised edition of Glanvil.

[7] Glanvil viii 3.

Glanvil's consent, and perhaps under his supervision.[1] It long remained the standard text-book of English law. About the year 1265 an attempt was made to produce a revised and up-to-date edition.[2] Bracton made extensive use of it; and an edition of it was introduced into Scotland under the name of Regiam Majestatem in the early part of the thirteenth century.[3]

Glanvil's treatise is divided into fourteen books. The first book begins by drawing general distinctions between criminal and civil pleas; between pleas which are heard by the king's court, pleas which are heard by the sheriff by virtue of the royal writ, pleas which are heard by the county court, and pleas which are heard by the lords of franchises.[4] It then proceeds to discuss the procedure upon a writ of right up to the appearance of the parties, giving a short account of the various essoins, or excuses for non-appearance, open to demandant or tenant, and saying something of the consequences of non-appearance of either demandant or tenant without a lawful essoin. The second book carries on the account of the proceedings upon the writ of right after the parties have appeared. The parties must state their case in formal words, and the tenant may elect to have the case tried either by battle or the grand assize, or, if both parties come of the same stock, by the court itself as a matter of law. Glanvil gives a detailed account of the grand assize,[5] summarizing the cases in which this manner of trial was available. The third book deals with the procedure which is followed when the tenant vouches to warranty, and with the somewhat analogous case where the lord of either demandant or tenant must be summoned because his interests are involved. In the fourth book Glanvil passes to the subject of advowsons. He distinguishes the assize of darrein presentment[6] from the proceedings to establish the right to the advowson. The treatment of the assize of darrein presentment is reserved till a later book. He then discusses the procedure to be followed, firstly, where the church is empty, and secondly, where the church is full. Something is said of the relation between the lay and the ecclesiastical jurisdiction; and specimens are given of the writs of prohibition addressed to the ecclesiastical courts where they exceed their

[1] P. and M. i 143 n. 3—this conjecture of Maitland's rests upon the fact that Bracton (f. 188b) chooses as examples of names his own and that of Hubert Walter. The latter was a very uncommon name. He may have chosen it because it was the name of his predecessor in legal literature.

[2] H.L.R. vi 1. The author follows the text as far as xi 3, and then adds a summary of the original writs then obtainable, 16-19.

[3] Acts of the Parliament of Scotland (Rec. Comm.) i.

[4] Bk. i cc. 1-4.

[5] Vol. i App. I.

[6] Vol. i 276, 329, and App. IIIc; vol. iii 24-25.

jurisdiction.[1] The fifth book deals with the subject of villeinage —the proceedings which must be taken to prove it, the manner in which it may terminate and begin. The sixth book deals with the wife's dower. The various kinds of dower are detailed, and something is said of the remedies which the widow has for enforcing her claims. The seventh book deals with inheritance. Glanvil begins by stating some of the old rules which imposed restraints upon alienation in the interests of heirs, and discusses the maxim that the same person cannot be at the same time lord and heir of the same piece of land.[2] He then states what are the rules which regulate the descent of land. These rules are still archaic and unsettled. They still turn much upon the tenure by which the land is held, or the custom of the district. Glanvil then passes to the subject of wills, and the liability of the heir for the debts of the deceased. This leads to a discussion of the law applicable when the heir is a minor. The rights of the lord to wardship and marriage, and the differences in these respects between military and socage tenure, are noticed. The manner of proceeding when a question of legitimacy is at issue is then explained. Glanvil then deals with the lord's right to escheat in the case of the failure of the tenant's heirs, and with the analogous topics of forfeiture and escheat in the case of his committing felony. Finally, the law as to gifts in maritagium is discussed.[3] The eighth book deals with final concords.[4] Glanvil gives some specimens of these instruments. He explains how they are enforced; and, as incident to this explanation, he has something to say about records in general, and about the differences between courts which are of record and courts which are not.[5] The ninth book deals with homage and the obligations resulting therefrom; the reliefs payable when homage is accepted; the aids which a lord may exact of his tenants. Finally, he notices the subject of purprestures or encroachments.[6] The tenth book deals with debts and varied kinds of contracts. Glanvil has borrowed from Roman law the names of various contracts and the technical term "causa."[7] But the substance of the book shows, as we shall see, that these Roman words are but names.[8] We see in this book much old law as to

[1] Vol. i App. XIIa 1.
[2] Vol. iii 176-177.
[3] Ibid 111-112.
[4] Ibid 236-245.
[5] Bk. iv Pt. I. c. 3.
[6] For this term see Reeves, H.E.L. i 208 n. a; Select Civil Pleas (S.S.) no. 247.
[7] x c. 3, "Is qui petit pluribus ex causis debitum petere potest, aut enim debetur ei quid ex causa mutui, aut ex causa venditionis, aut ex commodato, aut ex locato, aut ex deposito, aut ex alia justa causa debendi."
[8] Below 204.

the proceedings possible to an owner who has lost his goods.[1] The Roman law which it contains is very much on the surface. The eleventh book relates to the appointment and the authority of attorneys.[2] The twelfth book deals with varied kinds of writs of right applicable to proceedings in the lord's court, or in the county court.[3] There are a few remarks about pleading; and a general statement of the principle that no man need answer concerning his freehold without the king's writ—except in the case of land held by a clerk in frank-almoin.[4] The thirteenth book deals with the various kinds of possessory assizes, and other recognitions which it might be necessary to take in connection with them.[5] The fourteenth book deals with the pleas of the crown—treason, concealment of treasure trove, homicide, burning, robbery, rape, and forgery. A clear explanation is given of the two kinds of procedure which might be adopted—the presentment by a jury and the appeal of the private accuser.[6] In the last chapter Glanvil mentions, in order to pass them over, thefts and smaller offences which are dealt with by the sheriff.

The State of the Law

All these varied sources of law show us what strides had been made in the formation of the common law in the reign of Henry II. Reeves says[7] that "the work of Glanvil, compared with the Anglo-Saxon laws, is like the code of another nation;" and this statement is literally true. In the law, as thus presented to us, we can trace three chief elements. (i) The rules of the king's court; (ii) the influence of Roman law; (iii) the basis of customary law.

(i) The rules of the king's court.

We must look to the rules of the king's court for the foundations of the common law. I shall deal with these rules under the following heads: forms of action and procedure, constitutional law, the pleas of the crown, the land law, and personal status.

Forms of action and procedure.

The forms of action and the procedure of the king's court are, as I have said, the most important part of the law at this

[1] x cc. 15-17; above 110-114; vol. iii 319-322.
[2] For the attorney see below 315-318.
[3] Vol. i App. V.
[4] xii c. 25.
[5] Vol. i App. II. and III.
[6] xiv c. 1, "Aut certus apparet accusator," or else "fama solummodo publica accusat," below 197-198, 256-257, 360-364.
[7] H.E.L. i 256.

period. We can see that the king's court knows already a number of writs, corresponding to the various causes of action which come before it, which any litigant can obtain of course.[1] A list taken from Glanvil will be found in the Appendix.[2] They are very different from the very miscellaneous collection of writs which are characteristic of the preceding period.[3] Many of them have obtained in substance the form which they will permanently possess.

The writs themselves indicate the extent of the jurisdiction already appropriated by the king's court. In the writ of prohibition we can see the weapon which was destined to enable the king's court to make good its claims to jurisdiction against many of its rivals.[4] In the writs of pone,[5] justities,[5] and recordari facias[6] we can see the process by which the king's court was able to control the local jurisdictions. We may note especially that the numerous writs relating to actions in respect of land held by a free tenure are fast attaining fixity.[7] We see the possessory assizes and various forms of the writ of right. Though we do not see the writ of entry in Glanvil's book, we begin to hear of such a writ about this time.[8] The king's court is assuming jurisdiction over personal status. The writ de nativis could always be removed by writ of pone to the king's court.[9] The writs of debt,[10] detinue,[11] covenant,[12] and de plegiis acquietandis[13] show that the court is beginning to assume jurisdiction over property other than land; but such actions are rare compared with those relating to land.[14]

We can see the distinction between original and judicial writs. Some writs, e.g. the writ of right, are original, that is, they originate an action. Others are only issued in the course of the proceedings in an action in order to sanction or to compel

[1] Vol. i 47-48. [2] No. VA.

[3] Above 171-172; cp. Maitland, Forms of Action 315.

[4] Vol. i App. XIIA 1. [5] Ibid App. VI. and VII.

[6] Glanvil viii c. 9; Select Pleas of the Crown (S.S.) nos. 172, 192.

[7] Vol. i App. I., II., III., V.

[8] Vol. iii 12; H.L.R. iii 168, and the references to Rot. Cur. Reg. there cited; Select Civil Pleas (S.S.) no. 59 (1200), "John de Cakton . . . demands against Jollan de Amundeville half a knight's fee with appurtenances in Wymondthorpe . . . *in quod feudum non habuit ingressum*," etc.; cp. nos. 167, 192, 211; for forms of such writs see vol. iii App. IA 1.

[9] Glanvil v cc. 1, 2; Select Civil Pleas (S.S.) nos. 78, 164.

[10] Vol. i App. IV.; Select Civil Pleas (S.S.) no. 146; Rot. Cur. Reg. (R.C.) ii 5.

[11] Glanvil xii c. 12; Select Civil Pleas (S.S.) no. 8.

[12] Glanvil does not give the writ, but it was in use about this time. We see in Select Civil Pleas (S.S.) no. 89 (1201) a "placitum conventionis."

[13] Glanvil x c. 4; Reeves, H.E.L. i 210 n. 2; it ultimately became the writ by which the surety asserted his claims against the principal debtor.

[14] Vol. i 48.

the parties to take the necessary steps.[1] Instances are writs issued to seize the lands of a person who will not appear,[2] to deliver possession to a successful litigant,[3] to view the land,[4] to summon the grand assize,[5] to summon a person vouched to warranty.[6]

It is not probable that an official register of writs was in existence at this early period.[7] The king was, as I have said, very free to issue what writs he pleased.[8] The rolls of the king's court show that there was not as yet any fixed and classified series of actions. Thus we read of a plea "of finding necessaries" for the defendant's brothers and sisters;[9] of a case in which the cause of action was the unjust taking of the plaintiff's oxen, and also "the vexing" of the plaintiff in other ways, so that his land lay untilled;[10] of a case in which the cause of action was the fact that the defendant had caused the plaintiff to be appealed of robbery[11]—seemingly an early form of action for malicious prosecution. The court is not fettered by precedents. It is both able and willing to act upon principles of equity that right may be done;[12] and sometimes, notably in the case of the mortgage, its procedure adopts the view ultimately taken by the court of Chancery, rather than that ultimately taken by the courts of common law. For instance, in Glanvil's day, there must be a judgment of the court before the land mortgaged was finally forfeited to the creditor.[13] It is clear, however, that we have attained one of the leading characteristics of English law. It consists of a number of distinct causes of action each begun by its appropriate writ.[14]

The growth of a number of regular forms of action is accompanied by an increased attention to the forms of pleading and process. Glanvil discusses the results of a variance between the writ and the plea in a writ of right.[15] In 1200 a writ was

[1] P. and M. i 173; ii 589.
[2] Glanvil i c. 13.
[3] Ibid i c. 17.
[4] Ibid ii c. 2.
[5] Ibid ii c. 11.
[6] Ibid iii c. 3.
[7] Below 513; H.L.R. iii 107—though Coke in the preface to vol. viii of his Reports states that he has seen such a register.
[8] Vol. i 47.
[9] Select Civil Pleas (S.S.) no. 115; cp. Bracton ff. 18, 20, 20b, 47—we seem to see the corody (vol. iii 152-153) in germ.
[10] Ibid no. 86.
[11] Ibid no. 181—see Introd. xx for a note as to some other unique causes of action.
[12] Glanvil vii c. 1, "Super hoc ultimo casu in curia domini regis de consilio curiæ et ex æquitate consideratum est;" P. and M. i 168, 169.
[13] Vol. iii 129; Bigelow, History of Procedure 192-196; Hazeltine, Essays on Legal History (1913) 265-267.
[14] This is neatly expressed by Bracton f. 413b, "Tot erunt formulæ brevium quot sunt genera actionum."
[15] xi c. 24.

quashed because the plaintiff "demanded by word of mouth another thing than she demands by her writ."[1] Both the defendant and the court take advantage of defects in the writ.[2] The court was specially strict in dealing with the appeal of felony.[3] These appeals were liable to be quashed for the smallest fault in pleading.[4] This was an old characteristic of an old form of criminal procedure. We shall see that it continued to be a marked characteristic of criminal procedure long after the procedure by way of appeal had been superseded by the procedure by way of indictment.[5]

As yet men's conceptions of a trial were substantially the old conceptions. The plaintiff with his *secta* made his plaint. The defendant denied it; and the court awarded to one or other party the right of going to the proof in one or other of the ways known to the law.[6] But in the jury[7] a new mode of proof is gradually coming to the front which will materially modify the older ideas. This new mode of proof is gaining ground both in civil and in criminal cases. In civil cases sometimes the facts in issue, sometimes incidental questions arising in the course of the trial, are submitted to this test.[8] In criminal cases the accused will sometimes pay the crown a large sum to have an inquest[9]—the result of which is not always conclusive.[10] But as yet the old modes of proof—battle, ordeal, and compurgation—hold their ground.[11] It is not, as we have seen, till the end of the thirteenth century that the victory of the jury is complete.[12]

Constitutional Law.

There is little in this period that we can call constitutional law. As I have said, all as yet depended on the person of the king. But perhaps we can see the germs of what was destined to be the chief characteristic of our constitution—the supremacy

[1] Select Civil Pleas (S.S.) no. 16.

[2] Ibid nos. 23, 76, 91; in case 31 a writ was quashed because it spoke of "*sororum* itinerationis," instead of "*sociorum*."

[3] The appeal is an accusation of crime by a private accuser, below 197.

[4] Below 198, 360.

[5] Vol. iii 616-619.

[6] Above 107; vol. i 299-302.

[7] Ibid 313-314.

[8] Glanvil, ii c. 6, is dealing with a case of inheritance where the assize will not lie because both parties are sprung from the same stock; if the question is whether or not they are sprung from the same stock, "decurrendum erit ad vicinetum;" see ibid v c. 4; ix c. 11; xiii c. 11.

[9] Vol. i 323.

[10] Select Pleas of the Crown (S.S.) no. 100.

[11] Vol. i 305-311; Select Civil Pleas (S.S.) no. 41, "Abbas dicit quod non ponet se super juratam de tam antiquo tempore;" the growth of the newer system may be illustrated by two cases of 1221 in the Pleas of the Crown (S.S.) nos. 153, 200, where a prisoner is hanged though he declines to put himself on a jury; as to these cases see vol. i 326-327.

[12] Vol. i 321-331.

of the law. It was one of the first principles of the old customary law that the suitors of the court were the judges.[1] The king's court was no exception to the rule when cases were brought before the whole court; and we have seen that this old trait still survives when the House of Lords sits to try a peer accused of treason or felony.[2] No doubt the courts held before the royal judges on circuit or at Westminster differed from the communal courts and from the general body of the king's court in this respect. The royal judge formed the court; and, as we have seen, it was the dislike to this novel mode of trial which caused the barons in 1215 to demand the "judicium parium."[3] No doubt where the king's interests were concerned the royal control was strict.[4] But, when there was no occasion to exercise this control, the fact that the royal judges began to sit as regular tribunals at a time when the idea that the suitors of the court were the true exponents of the law was the most usual and natural idea, cannot have been without its influence. It would naturally emphasize the dominant view of mediæval statesmen and thinkers that the law should reign supreme;[5] and lead the judges, in ordinary cases, to regard the exposition of the law as emanating from the court rather than as emanating from the king. They were royal judges, it is true; they were bound to obey royal commands; but they were judges making law at a time when it seemed natural that the court should expound the law—when "quod paribus placuit," rather than "quod principi placuit" seemed to have the force of law. It is easy to see that this idea as to the position of the law tends to give it an independence which is quite foreign to a body of law based upon Roman ideas or Austinian analysis. We shall see that it was destined to bear much fruit.[6] Just as the fact that the jury was born into an atmosphere permeated with ideas drawn from older modes of trial was one of the causes of its peculiar development in England,[7] so the fact that royal judges were beginning to create law, at a time when it was natural to think of law as a rule declared by the court, prevented them from regarding it as something which depended merely on the king. It was the fortune of our law to be able to use the effective processes of royalty without becoming entirely dependent upon the king—to be able to become common without entirely ceasing to be customary.

[1] Vol. i 10, 11.
[2] Ibid 40, 59-60, 385-389.
[3] Ibid 59-60.
[4] P. and M. ii 585.
[5] Above 121-122, 131-132.
[6] Below 252-256, 441-443.
[7] Vol. i 316-317.

The pleas of the crown.

We have seen that there were a certain number of cases jurisdiction over which was regarded as peculiarly within the province of the crown.[1] These cases tend to increase in number and variety under the strong government of Henry II; and in the jury of presentment the crown had an effective machinery for gathering information as to the breaches of the law which it was interested in suppressing.[2] We have seen that the list of things about which the king wishes to be informed can, at the beginning of the thirteenth century, be grouped under three heads—the proprietary rights of the crown, the misdoings and negligences of officials and communities, and serious crimes. These matters form the pleas of the crown.[3]

For information upon the first two of these heads the crown relied on the presentments of the juries of the hundred. For information upon the third the crown relied partly upon the same source, and in time comes to rely in theory[4] entirely upon it. But in the twelfth and thirteenth centuries and for some time to come the crown will rely as much upon the appeal of the private accuser as upon the presentment of a jury. The appeal of the private accuser must have appeared the obvious beginning of criminal procedure to a society which remembered the wergild and perhaps the blood fued;[5] and it can hardly be dispensed with by a government which is as yet new, which has no force of police, no law-abiding habit to assist it.

As yet, therefore, the appeal by the private accuser holds an important place in criminal procedure. The law is strong enough to suppress private war; but the number of appeals would seem to show that the usual consequence of this suppression followed—the prosecution of feuds was transferred to the law courts.[6] Angry litigants preferred to settle purely civil causes of action by criminal proceedings.[7] We have in 1203 a series of appeals which Maitland thinks turned upon a dispute to forestal rights;[8] and in 1214 a still longer series which

[1] Above 48-49. [2] Vol. i 321-322.

[3] Ibid 269, 271; Select Pleas of the Crown (S.S.) nos. 167, 168.

[4] In theory, because, though offences are presented by the grand jury, that body simply acts in most cases upon the information and in accordance with the opinion of the magistrate by whom the prisoner has been committed for trial. As to the growth of this process see vol. i 295-297

[5] Above 44-46.

[6] Vol. i 506-507.

[7] Rot. Cur. Reg. (R.C.) i 38; that the appeal was often used simply to gratify revenge is clear from § 36 of Magna Carta, vol. i 57; for the later history of the appeal see below 361-364.

[8] Select Pleas of the Crown (S.S.) no. 88.

probably originated in a difference of opinion between a lord and the heir of a deceased tenant as to the lord's rights.[1] In another case the plaintiff tried to make the proceedings taken in a civil action the ground of an appeal.[2] But because appeals were pleas of the crown the judges kept a watchful eye upon them. They were sharp to note any contradictions in the tale told by the appellor,[3] or any technical faults in the statement of the case;[4] and they took evidence as to the conduct of the parties.[5] In fact the appeal, so controlled, is the bridge between the earlier law, when the appeal was the substitute for the blood feud, and the later law, when criminal proceedings are taken by the state. We can see the beginnings of the later law in the use which is made of the jury of presentment. It is used, not only to bring suspected persons before the court, but also to assist the court in coming to a decision as to whether or no an appeal shall be quashed.[6] The jury was strictly controlled by the court;[7] and, as so controlled, its presentment was clearly a better means of arriving at the truth than the appeal of the private accuser. With the growth of the former procedure and the decay of the latter, the part played by the state in suppressing crime will be emphasized. We shall be approaching nearer to the modern distinction between criminal law and the law of tort, which consists in the fact that the sanctions of the former are enforced at the discretion of the sovereign.

But the fact that our criminal law has grown up simply as a branch of the pleas of the crown will give rise to many difficulties in interpreting the word "criminal." When that word has come to mean in popular phraseology, and sometimes in the phraseology of the statute book, a form of serious wrongdoing, when the procedure to punish such serious wrongdoing has become a distinct branch of procedure with its own special

[1] Select Pleas of the Crown (S.S.) no. 115; cp. no. 105.

[2] Ibid no. 159, "De eodem facto fuit assisa capta et dampnum datum, consideratum est quod nullum est appellum inter eos;" cp. ibid no. 35, "Appellum de pratis pastis non pertinet ad coronam regis."

[3] Ibid no. 97, "Warinus postea interrogatus ubi ipse Alanus obiit dixit quod obiit apud Londoniam. Unde quum prius dixit quod vidit eum interfici apud Neuha, et postea confessus est ipsum obiisse apud Londoniam, Edwardus sit quietus, et Warinus in misericordia."

[4] Ibid nos. 19, 26, 33, 54, 67, 136, 138, 165.

[5] Ibid nos. 19, 24, 26, 39, 60.

[6] Ibid nos. 23, 39. In no. 42 the parties put themselves upon the wapentake, as to the correctness of the facts alleged; after hearing what the wapentake, the county, and the coroners have to say the court quashes the appeal.

[7] Ibid nos. 15, 38, 67, 75; the record of the last case is as follows: "Robertus Albus occidit Walterum de Hugeford et fugit. Et juratores dicunt quod utlagatus fuit pro morte illa, et comitatus et coronatores dicunt quod non fuit utlagatus. . . . Et quia juratores non possunt contradicere comitatui et coronatoribus ideo sunt in misericordia."

rules, it will be necessary to pass statutes and to decide cases in order to determine whether certain pleas of the crown are criminal causes or matters.[1] The term "criminal" has not easily become a term of art in our law.[2]

The Land Law.

The doctrine of tenure has been applied universally to the land law. "Every acre of English soil and every proprietary right therein have been brought within the compass of a single formula which may be expressed thus: *Z tenet terram illam de . . . domino Rege.* The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account these royal demesnes, then it is true that every acre of land is held of the king."[3] The man who holds directly of the king is the tenant *in capite.* He may either keep the land in his own hands—hold it in demesne, or he may grant it to some one else. In the latter case he holds the land in service; and his tenant holds it in demesne or in service, according as he keeps it in his own hands or grants it out to another. There may be many steps between the tenant in demesne and the king.[4] This relationship of tenure creates correlative obligations between lord and tenant. The lord owes defence and warranty to the tenant. The tenant owes his services to his lord. He must swear fealty; and sometimes do homage.[5]

The fact that this doctrine of tenure has been applied universally to the land law is a purely English phenomenon. Other countries knew feudal tenure; but the law governing it applied only to noble or military tenure. The feudal law is not the ordinary law of the land. The term "feodum," tells us something of the quality of the tenure. In England the king's court has generalized feudal conceptions of land holding and made them part of the ordinary law. The term "feodum," or fee, tells us nothing of the quality of the tenure. It simply tells us that the tenant holds land which will descend to his heirs.[6]

[1] 28, 29 Victoria c. 104 § 34 (evidence in revenue proceedings); 40, 41 Victoria c. 14; 46, 47 Victoria c. 51 § 53; Kenny, Criminal Law 17, 18 for decisions as to what is a criminal cause or matter within § 47 of the Judicature Act, 1873. The question whether an appeal was a criminal or a civil proceeding puzzled the Court of King's Bench in 1770, Bigby v. Kennedy, 5 Burr. 2643; cp. P. and M. ii 571.

[2] Glanvil uses the term "criminale" (i 1; xiv 8), but he seems to mean both the pleas of the crown and the smaller wrongs dealt with by the sheriff; really he has borrowed a foreign term, P. and M. ii 570.

[3] Ibid i 210, 211; English Society 232-234; cp. Y.B. 14, 15 Ed. III. (R.S.) 346, "All the land in England is holden of the king in chief," *per* R. Thorpe *arguendo.*

[4] See for an instance P. and M. i 211; and cp. vol. i 176 n. 11.

[5] Vol. iii 54-57.

[6] P. and M. i 213, 214, and notes. As yet the tenant in villeinage does not hold in "fee," ibid 213 n. 3.

The conception of tenure, therefore, is hardworked by English law. It covers very different sets of relationships. The earl, the knight, the church, the tenant who performs labour services, the tenant who pays rent, all hold the land of some lord and ultimately of the king. Thus one piece of land may be held by very various tenures. A, holding by military service of the crown, may enfeoff B to hold of him by a money rent (socage), and B may enfeoff C, a church, to hold on the terms of praying for the souls of B's ancestors (frank-almoin).[1] A, B, and C all have rights in the same piece of land. As between the crown and A, as between A and B, as between B and C, each tenant owes the service promised; and the service thus due as between grantor and grantee is called *intrinsec.* But all these various services due from A, B, and C are imposed upon the land and, so to speak, run with it. If A makes default in his service the king can distrain upon the land in the hands of C. The service thus imposed upon and due from the land, irrespective of any bargain made between subsequent holders, is termed *forinsec.*[2] A's military service due to the crown is outside any bargain made between A and B, or B and C. If, however, A makes default in his service so that the king distrains and thus disturbs C, C may by writ of *mesne*[3] proceed against B, and B may by the same writ proceed against A.

The universality of tenure and its consequences made for uniformity and simplicity in the land law. Old rules and ideas were recast in the light of the doctrine of tenure.[4] The free men of the Saxon period became, in some cases, the king's tenants.[5] But insistence on the doctrine of tenure tended to group tenants round their lords, and thus created the economic conditions precedent which made for the arrangement of these tenants in manors rather than in the village communities of the preceding period,[6] and for the treatment of their rights as dependent upon an original grant by their lord rather than as the result of "an original communal ownership."[7] The law thus became committed to many very unhistorical theories which squared

[1] Y.B. 33-35 Ed. I. (R.S.) 376, 490. For these various tenures see vol. iii 34-54.

[2] Bracton ff. 35-37. Maitland points out that these terms were in common use in Richard I.'s day to mean service due from the land outside the bargain between the lord and the actual tenant of the land, P. and M. i 217 n. 3; Select Civil Pleas (S.S.) nos. 77, 192; Bracton's Note Book cases 1631, 1076; Madox, Form. no. 312; see vol. iii 39 n. 4 for another application of the term.

[3] This writ is not in Glanvil. It appears early in the thirteenth century, H.L.R. iii 113, 115; see vol. iii App. Ia 3.

[4] English Society 234.

[5] D.B. i 159b (Oxfordshire), "Has duas terras quas tenet Orgar de Milone de rege deberet tenere: ipse enim et pater suus et avunculus tenuerunt libere T.R.E."

[6] Vinogradoff, Manor 300, 301.

[7] Ibid 308.

badly with the facts—for instance, the tenant's rights of common tended to be regarded as springing from the lord's grant. The contrast between the position which the lord will occupy from the point of view of a common law dominated by this rigid theory of tenure, and the position which he will occupy from the point of view of his manorial court, in which the older communal theories have freer play,[1] will be the outward and visible sign of this divorce between legal theory and historical fact.

As yet the kinds of tenure known to the law are not classified in their final form. It is possible, for instance, that tenure by barony was regarded as a tenure distinct from that of knight service.[2] But we do see in Glanvil's book the names of the tenures which will have a long history in English law—knight service, frank-almoin, serjeanty, socage, and burgage.[3] We cannot, of course, expect to see the incidents of these tenures clearly defined. Socage tenure, for instance, depends largely on local custom; and this makes it look something like villein tenure.[4] The class of socage tenants was made up of the free-holders and sokemen of Saxon times; and, as we have seen, the line between them and the inferior classes who cultivated a lord's manor was often fine.[5] In fact, at this period, the socage tenant is more like the *roturier* of French law[6]—half-way between the villein and the knight—than anything that will be known to English law. Such questions as the powers of alienation possessed by the tenant and the rules of descent are still unsettled.[7]

The only tenures recognized by the royal courts are the various kinds of free tenure. These free tenants cultivate their land by the help of the labour services of the agricultural population, who perform these services in return for grants of land. But of these arrangements the royal courts take no cognizance.[8] The free tenant alone is recognized. Those who hold of the free tenant on such terms hold by villein or unfree tenure. Their rights depend not on the common law, but on the custom of the manor. At the same time we may note that the doctrine of tenure is applied to them; and we shall see that when manorial jurisdiction has become more settled, the law relating to unfree tenure will be influenced by many of the rules relating to free tenure.[9]

[1] Below 377-379.
[2] P. and M. i 258, 259.
[3] ix c. 4.
[4] Glanvil vii c. 3.
[5] Above 42-43.
[6] Esmein, Histoire du droit Français 242-249.
[7] Glanvil vii c. 1; Select Civil Pleas (S.S.) no. 82; vol. iii 73-75, 76-78, 171-185.
[8] Vol. iii 29-30; cp. Select Civil Pleas (S.S.) no. 123.
[9] Below 379-381; vol. iii 206-207.

Personal status.

Glanvil still knows a class so definitely unfree that they cannot be manumitted merely by the private act of their lord. Their lord may indeed make them free as against himself: he cannot by his private act make them free as against all the world.[1] They can own no property, so that they cannot buy their freedom.[2] In this class of persons we see the Saxon servi. But this class was fast disappearing. In the first place, economic causes made for its extinction. It was easier to cultivate the land by means of tenants bound by their tenure to perform labour services than to supervise the work of actual slaves. The village community might become a manor, subject to a lord; but it would hardly have been possible to continue to cultivate the land upon the open-field system if it had become a mere assemblage of slaves. The very fact that the Norman Conquest made for the wholesale degradation of the humbler classes into a condition of dependency on their lords prevented them from becoming slaves.[3] In the second place, the growth of the common law was unfavourable to the existence of a class of slaves. The crown protected the life and limb of all its subjects; and so we find that the distinction between free and unfree has little application in the criminal law.[4] Thus the actual slaves which survived the Conquest became anomalous and were rapidly merged in the general mass of the dependent classes. We see existing in embryo the causes which will lead to the peculiar villein status of later mediæval law.[5] We can see, too, that though this unfree or villein status is closely connected with unfree or villein tenure, the two things are sometimes distinct;[6] and this again will be a feature of the later law.

(ii) The influence of the Roman law.

The second element in the formation of the law is the influence of the Roman Law, Civil and Canon. We do not see, it is true, many traces of this influence in the terse records of the king's court; but, without the aid of some ideas drawn from these sources, these records would hardly tell us of so rapid a

[1] Glanvil v c. 5; this is the interpretation of this passage adopted by Maitland, P. and M. i 411, 412; cp. Leg. Henr. 78. 1 (there cited), which lends confirmation to this view. For a parallel case in India see Buckle, History of Civilization i 59, quoting from the Laws of Manu; a decision which followed this idea in 1226, Bracton's Note Book, case 1749, was condemned by Bracton, and is quite contrary to the later law.

[2] Glanvil v c. 5.

[3] Vinogradoff, Manor 332-335.

[4] Ibid, Villeinage 65.

[5] Vol. iii 491-500.

[6] Cp. Select Civil Pleas (S.S.) nos. 58, 164, 235. Vinogradoff, Manor 336, thinks that the existence of the free person who holds by an unfree tenure may be due sometimes to the manumission of a slave.

progress in the development of coherent doctrine. If isolated decisions are to produce a reasonable body of law, the minds of those who decide must have been trained by the knowledge of some general legal ideas. Still more do we need such ideas for the invention of the forms necessary for carrying out and enforcing the law. The legal ideas and the legal forms familiar to the civilian and the canonist, and therefore to many of the statesmen-judges of this period, are not far below the surface of the records of the king's court.[1]

It is in the connected treatises upon the law that we see these ideas most clearly. We have seen that the Dialogus de Scaccario shows signs of the humanizing influences which marked the court of Henry II.[2] Glanvil's treatise exhibits the legal aspect of these influences in a marked degree. The very idea of writing such a treatise upon the practice of the king's court may, as we have seen, have been suggested by various contemporary tracts upon canon law procedure.[3] The preface and introductory chapters are taken from the preface to Justinian's Institutes—that preface had, in fact, become the conventional mode of beginning a legal treatise; and all through the book we see traces of the influence of Roman rules more or less adapted to the fabric of English law.

Sir Paul Vinogradoff has pointed out[4] that "William Longchamp's 'Practice'[5] urges the necessity of definite formulæ of actions, and it may be considered in this respect as introducing the theory of strict writs adhered to by the common law."[6] Many of the rules as to the challenges which could be made to jurors were borrowed from the exceptions which could, by the canon law, be made to witnesses.[7] We see signs of a tendency to assimilate the position of the villein to that of the Roman slave;[8] and this attempt at identification, though it could not succeed, will have something to do with determining the incidents of villein status. At the beginning of the seventh book Glanvil directly refers to Roman law in order to contrast the Roman *dos* with the English dower;[9] and in the course of the same book he remarks that the English

[1] Stubbs, Lectures on Mediæval and Modern History 352; Stephen's Pleading note 2—it is there pointed out that the royal writs are somewhat like the Frankish "præceptiones" as preserved in Marculfus.

[2] Above 187-188.

[3] Above 176.

[4] Roman Law in Mediæval Europe 88.

[5] Above 176.

[6] For further illustrations of this influence on the form of common law writs see below 228.

[7] Glanvil ii c. 12.

[8] Ibid v c. 5; Dialogus de Scaccario ii § 10 p. 139; Select Pleas of the Crown (S.S.) no. 3; Vinogradoff, Villeinage 44, 45.

[9] vii c. 1, "In alia acceptione accipitur dos secundum leges Romanas."

law as to legitimation is not "secundum canones legesque Romanas."[1] In the tenth book Roman contracts are, as I have said, introduced by their Roman names.[2] But here there has been mere borrowing without assimilation. The Roman contracts would not fit in with English law. Mere consent did not make a sale; and, though doubtless English law knew such arrangements as *mutuum*, *commodatum*, *depositum*, *pignus*, or *locatio conductio*, they were hardly accurately distinguished; nor could they be enforced, unless there was something to evidence them, such as a charter, an actual traditio, or the presence of a surety.[3] The essence of the Roman contract system—the presence of distinct *causæ*—is wanting. Indeed, the admission, which Glanvil makes more than once, that the king's court does not usually interfere to enforce such "privatæ conventiones," shows us that the king's court knows as yet no law of contract.[4] The writ of debt, in which the plaintiff claims the restoration of his own money of which he has been deforced,[5] shows us that we are very far from anything like the modern idea of contract. We shall see that it will be long before English law, following a road of its own, attains this conception.[6]

Such borrowings and such references as these show acquaintance with Roman law. They do not testify to any important reception of its principles. There are, however, some branches of English law the principles of which can be traced to a conversion of Roman principles to English uses.

One of the most successful of Henry's reforms—the Assize of Novel Disseisin—can be traced to the *actio spolii* of the canonist; and, through this *actio spolii*, to the interdict *unde vi*.[7] The rule that corporeal things can only be conveyed by actual livery of seisin is probably borrowed from the Roman rule that traditio is needed for a valid conveyance.[8] We have seen that no such strict rule as this was known in Anglo-Saxon times.[9] Even in this period symbolical transfers were still

[1] vii c. 15.

[2] Above 191.

[3] This is clearly brought out in x c. 8; he is there explaining that a pledge is not valid unless there has been traditio, so that if a thing is pledged to two successively, and the debtor still retains it, there will be no action given by the king's court.

[4] x cc. 8 and 18, "Ut prædictum est privatas conventiones non solet curia domini regis tueri, et quidem de talibus contractibus qui quasi privatæ quædam conventiones censeri possunt, se non intromittit curia domini regis."

[5] Vol. i App. IV.

[6] Vol. iii 428-453.

[7] P. and M. i 114.

[8] Code 2, 3, 20, "Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur;" P. and M. ii 88; Madox, Form. Angl. ix, x.

[9] Above 76-77.

known;[1] but Glanvil, when stating the law as to the validity of gifts which defeat the claims of expectant heirs, clearly lays it down that there must be a real livery of seisin.[2] We shall see that this rule was most strongly and literally insisted upon by the judges in the following period. No doubt the strict interpretation of the Roman rule was convenient to a court which relied upon the knowledge of the jury; for an actual transfer can never be entirely secret.

We can already see in Glanvil the beginnings of the rule of law which denies any kind of real right to the tenant for a term of years; and this rule is, in the opinion of Maitland, due to a following of the Roman law of possession. The Roman law relating to possession compelled the judges to hold that "there are some occupiers who are not possessors;" and in pursuance of this theory they laid it down that the man who holds for a term of years has not possession, and cannot therefore make use of the possessory assizes. The effect of this reasoning upon the English land law has not been happy. We shall see that its effect has been to exclude interests for a term of years from the category of real property—to divide our land law into halves. "English law for six centuries and more," says Maitland, "will have to rue this youthful flirtation with Romanism."[3]

In such cases as these the Roman law has suggested actual rules; and these rules, adapted to their new situation, have become the foundation of very important doctrines in English law. Above all, Roman law has, as I have said, supplied a method of reasoning upon matters legal, and a power to create a technical language and technical forms which will enable precise yet general rules to be evolved from a mass of vague customs and particular cases. We shall see that the extent and nature of this debt which English law owes to

[1] Madox, loc. cit.; Select Civil Pleas (S.S.) xv, xvii, and no. 16, "Et per quendam cultellum fractum quam ipsa ostendit ad hostium ecclesiæ inde ei saisinam fecit;" vol. iii 222-223.

[2] vii c. 1, "Si vero donationem talem nulla sequuta fuerit seisina, nihil post mortem donatoris ex tali donatione contra voluntatem heredis efficaciter peti potest quia id intelligitur secundum consuetam regni interpretationem potius esse nuda promissio quam aliqua vero promissio vel donatio."

[3] P. and M. ii 114; Glanvil does not expressly deal with the lessee for a term of years; but in one passage (x c. 11), when explaining the respective rights of the debtor and of the creditor who has taken land as security for his debt, he says that such a creditor, if deprived of possession, cannot bring the assize of novel disseisin. If he has been ejected by a third person the assize can be brought by the debtor: if by the debtor himself his only remedy is the special writ provided to recover the property pledged (x c. 10). Glanvil does not say in so many words that the land is pledged for a term of years; but this is reasonably clear from the preceding chapter; cp. Select Civil Pleas (S.S.) no. 79, and cp. no. 62.

the Roman law, civil and canon, will be still more apparent in the following period of rapid growth and expansion.[1]

(iii) The basis of customary law.

The third element is the basis of old customary law. Of its various rules little precise information can be given. Doubtless it consisted for the most part of those rules of law with which I have dealt in the preceding Book. The local courts did not keep records at this period. The records which we have are records of the doings of the king's court; and in the king's court the new rules were beginning to prevail. But that the older rules still held sway Glanvil is a witness.[2] The king's court was yet but the most powerful competitor among many competing jurisdictions. In the cases brought before it, and even in Glanvil's treatise, we see many traces of the old ideas and conceptions. The old methods of proof are still regarded as usual. Even a court may be obliged to defend its record by battle.[3] We still hear of the peace of the sheriff.[4] The king's peace may still be specially given.[5] It will still die with the king.[6] Franchises are still claimed in the old Saxon words.[7] In the pleas of the crown we read of the offence of "hamsoken."[8] In some cases we hear of the special customs of particular counties.[9] Glanvil tells us much of the old rules which restrict alienation in favour of near heirs.[10] The action of debt still retains, as we have seen, its old characteristics.[11] The owner who has lost his property can still recover it, as he could have recovered it in Saxon times, by the aid of substantially the old procedure.[12]

All these three elements—the rules of the king's court, the Roman law, and the basis of customary law—are present in the law of this period, but in a proportion very different from

[1] Below 267-286.

[2] "Leges autem et jura regni scripto autem universaliter concludi, nostris temporibus, omnino quidem impossibile est, cum propter scribentium ignorantiam, tam propter earum multitudinem confusam: verum sunt quædam in curia generalia, et frequentius usitata, quæ scripto commendare non mihi videtur presumptuosum, sed et plerisque perutile, et ad adjuvandam memoriam admodum necessarium," Preface.

[3] viii c. 8; for an instance in which an offer was made to prove the record of the county court false by battle see Select Civil Pleas (S.S.) no. 38.

[4] Select Pleas of the Crown (S.S.) no. 21, "Et comitatus cum wapentaco dicit quod non fuerunt appellati de pace regis set de pace vicecomitis;" cp. nos. 31 and 73; Rot. Cur. Reg. (R.C.) i 121, 244, 270.

[5] Ibid nos. 104 and 134.

[6] Ibid no. 115, p. 71 n. 5; Rot. Cur. Reg. (R.C.) i lxxxii; above 48.

[7] Rot. Cur. Reg. ii 6, 10; vol. i 20.

[8] Select Pleas of the Crown (S.S.) nos. 60 and 86.

[9] Ibid no. 152 and n. 5; no. 139.

[10] vii c. 1; vol. iii 73-74.

[11] Above 204.

[12] Above 110-114; Glanvil x cc. 13, 15; Select Pleas of the Crown (S.S.) no. 192.

that in which they were present in the preceding period. The rules of the king's court, evolved by the ablest men of the day under the rationalizing influence of Roman law, are already beginning to dwarf all other elements. They are fast reducing the old customary rules to insignificance. They are assimilating and adapting what they have borrowed from Roman law. The list of writs, and therefore of remedies, dispensed by the king's court is elastic. It is controlled by a court which does not hesitate, in the interests of equity, to overrule obsolete customs, and even to control what it deems to be an unrighteous use of its own procedure. The power and efficiency of the court have shown it to be superior to all its rivals.

III. Magna Carta [1]

The years in which Magna Carta [2] was secured were a critical period in the history of English law. The process of curbing the forces which made for disintegration by the creation of central institutions which administered a common law, had naturally aroused the opposition of those magnates to whom such disintegration meant independence and power. But in Henry II.'s reign the power of the crown was so strong that it was able to maintain and extend these central institutions and this common law against their opposition. But, as Mr. McKechnie says, "powers used moderately and on the whole for national ends by Henry were abused for selfish ends by both his sons." [3] The excessive taxation which was imposed to meet Richard's demands for money laid the seeds of future opposition to the king. But, during his reign, his almost constant absence from his kingdom had cast the odium of the measures which he had directed upon his ministers.[4] John was not an absentee; and he governed as well as reigned. Hence the growing unpopularity of the government centred round the king himself.[5] John, so far from endeavouring to placate this opposition, deliberately aggravated it. He used all the large powers of the

[1] On the whole subject see W. S. McKechnie, Magna Carta (2nd ed.); Magna Carta Commemoration Essays (R.H.S.); Adams, Origin of the English Constitution chaps. v and vi; L.Q.R. xxi 250; for the clauses of the Charter relating to the judicial system see vol. i 54-63.

[2] The name Magna Carta was a popular description, and perhaps came into use to distinguish it from the Charter of the Forest (below 219), E.H.R. xxx 472-475, xxxii 554; it is usually called by Bracton and the Chroniclers Carta Libertatum; it was first called Magna Carta in a letter of 1225 on the Close Rolls, E.H.R. xxxii 555; it was so called by Matthew Paris in 1237, and was again referred to by him under that title in 1242, McKechnie, op. cit. 157-158; it is interesting to note that at the beginning of the thirteenth century Henry I.'s Charter was once called "Magna Carta," R.H.S. Tr. (N.S.) viii 21.

[3] McKechnie, op. cit. 20. [4] Ibid 20-21. [5] Ibid 21.

crown, and all the new machinery of government, to oppress all classes of the nation. The barons found that more was exacted from them in services and in money; and that, at the same time, their profitable jurisdictional privileges were being constantly curtailed.[1] This oppression naturally reacted upon the smaller landowners who were their tenants; and at the same time he directly oppressed the smaller men through his sheriffs and bailiffs.[2] He waged open war with the church, and made heavy pecuniary demands upon the merchants.[3] John thus made the fatal mistake of "broadening the basis" of the opposition against him. "The order-loving townsmen had been willing to purchase protection from Henry at the price of heavy taxation; John continued to exact the price, but failed to furnish good government in return. Far from protecting the humble from oppression, he was himself the chief oppressor. . . . Far from using the perfected machinery of exchequer, curia, and local administration in the interests of good government, John valued them merely as instruments of extortion and outrage—as ministers to his lust and greed."[4]

Such a king could not be endured. But would his downfall involve the ruin of all orderly government? The work of Henry II. stood even this test. So great was the power of the crown that, though the feudal baronage necessarily led the opposition, though we therefore see feudal aims and ambitions of a retrogressive type in a few of the clauses of the Great Charter,[5] a combination of landowners with ecclesiastics and traders was needed to oppose the king successfully. The interests of all these classes were therefore consulted; and the need to provide for them reduced the purely reactionary clauses to very small dimensions. It seemed at one time as if even this combination would fail without foreign aid. Fortunately the death of John saved the country from the necessity of calling in a foreign dynasty. The nation rallied round the infant king; and thus a native development of the institutions and the law of the country was ensured.

All these classes united to obtain the Charter; to them it was "something definite and utilitarian—a present help for present ills;"[6] and consequently we find a curious mixture of varying aims and ambitions which make its clauses difficult to understand without an intimate knowledge of the history of the

[1] McKechnie, op. cit. 49; for the heavy and frequent scutages imposed by John see ibid 74; and for the controversy as to the liability of the barons for foreign service see ibid 68-69.

[2] Ibid 50.

[3] Ibid.

[4] Ibid 50.

[5] Vol. i 58-60.

[6] Magna Carta Commemoration Essays 9.

times. The difficulty is increased by its political and constitutional importance. It stands at the head of those two or three documents which contain, or are supposed to contain, some of the fundamental principles of the British constitution. Lawyers, historians, and politicians of every period of our history have interpreted it from the standpoint of every period of that history. From this point of view we may compare it to the Twelve Tables. In the same sense as they were regarded as "fons et origo juris civilis," Magna Carta is the fount and source of our constitutional law.[1] Like all documents which have attained not merely fame but sanctity, it has become the source of dogmas and doctrines of which its framers never dreamt; and an attempt to ascertain the meaning which the men of 1215 attached to some of its more famous clauses, no doubt would, if it were a theological document, be denounced as blasphemous. Fortunately the path of the merely secular historian is not blocked by the spectre of heresy. I shall describe (i) the nature of the Charter; (ii) its scope; (iii) its chief clauses; and (iv) its historical importance.

(i) The nature of the Charter.

Those who are skilled in diplomatic form have pointed out that the form of the Great Charter can be connected, through the Anglo-Norman writ charter, with the Anglo-Saxon writ. As Mr. Stevenson has shown, its form can be traced back, through the charters of liberties granted by Henry II., Stephen, and Henry I., to Cnut's charter of liberties.[2] But, as we know from the later history of our judicial records, diplomatic form, when stereotyped by the routine of an official department, is, of all things, the least susceptible of change. The manner in which the formal records of the courts of common law were drawn up was unchanged for many centuries; and yet we know that beneath this unchanged surface the whole conception of a trial and the manner in which it was conducted had altered.[3] And so it is with the Great Charter. Though its form represents the stereotyped style which the Chancery had inherited, its substance

[1] See McKechnie 123-129. R.P. iii 15 (1 Rich. II. no. 3) there is a petition that the judges and the serjeants shall examine and expound Magna Carta, "Eiant regarde a la grante noblez et la sage discretion q'estoit en le Roialme quant la dite Grandre Chartre estoit ordene et establiz;" see below 219 n. 7 for an attempt by Parliament to prevent any future statute from infringing its provisions.

[2] "It (Cnut's Charter) is, in substance and in form, the direct lineal ancestor of the Anglo-Norman charters of liberties and, in consequence, of Magna Carta. For in form these documents are developments of the Anglo-Norman writ charter, and that, in its turn, is . . . merely the Anglo-Saxon writ translated into Latin," E.H.R. xxvii 4; for a discussion of these Anglo-Norman charters of liberties see McKechnie, op. cit. 93-104.

[3] Vol. i 317.

bears witness to the vast changes which, since the Conquest, had taken place in the law and government of England—to an enormous increase in the power of the crown, to the rise of a centralized administrative and judicial system under the absolute control of the crown, and to the introduction of a logical and coherent feudal system. Though, therefore, we can trace its form back to Anglo-Saxon times, though we can trace the genesis of some of its clauses to that charter of Henry I. which Stephen Langton brought to the notice of the barons as a precedent for the demands which they were about to make upon the king,[1] the Great Charter differs fundamentally from any preceding charter in the manner in which it was secured, in its contents, and in its historical importance. It was secured by a combination of the landowners, the church, and the merchants; and therefore it contained clauses dealing specifically with their particular grievances. Since the time when the charter of Henry I. had been issued, a centralized administrative and judicial system had been created and elaborated. The Charter therefore necessarily contained many clauses which related to the working of that system. The granting of the Charter, and the success of the barons in maintaining it, opened a new chapter in English history, which ended by establishing a system of constitutional government, of which the Charter was regarded as the pledge and the symbol.

It is obvious that a document drawn up under these circumstances, and productive of such large effects, cannot be brought under any of the ordinary categories of political activity. Was it a grant, or a law, or a treaty, or a declaration of right, or a constitution?[2] If we look at it from the standpoint of modern jurisprudence, or of its influence upon later developments of constitutional law, we might plausibly maintain that it was any one of these things. But, if we wish to look at it from the standpoint of 1215, we must, as Sir Paul Vinogradoff has said, "locate our document in the pigeon-holes of mediæval and not of modern rubrication."[3] From this point of view it resembles "the enactments of the Congresses of German potentates and the *établissements* of Capetian kings." It was a *stabilimentum*—an enactment formulated by king, church, barons, and merchants, as partners in the legislative powers of the nascent state. We can find the closest modern parallel in the legislation resulting from those modern international conventions which have formulated rules of international law.[4]

[1] McKechnie, op. cit. 31-32, citing Roger of Wendover iii 293; above 151.

[2] For some account of these rather unprofitable speculations see McKechnie, op. cit. 104-108.

[3] L.Q.R. xxi 253.

[4] Ibid.

(ii) The scope of the Charter.

We shall see that the presence of strongly marked class distinctions was a characteristic feature of mediæval society.[1] This characteristic feature is therefore very marked in the Great Charter. It does not legislate for Englishmen generally, but attempts to safeguard the rights of different classes according to their different needs. Churchmen, lords, tenants, and merchants are separately provided for. But there are some clauses of the Charter, notably the famous section 39, in which rights are conferred upon all "liberi homines." The phrase liberi homines is clearly not confined to tenants in chief;[2] but did it include the villeins, or were they excluded from the benefits conferred? That they were considered to be included early in the fourteenth century is clear;[3] and Coke had good warrant for his assertion that, saving as against their lords, section 39[4] extended to them.[5] But it is fairly certain that they were not considered to be thus included in 1215. It is true that they seem to be provided for in section 20, which provides that a villein shall be amerced "saving his contenement and his wainage."[6] But it is fairly clear that they were thus protected, not because it was intended to confer any rights upon them, but because they were the property of their lords, and excessive amercements would diminish their value.[7] When the Charter was reissued in 1216, this intention was made quite clear by a slight alteration in wording. It was provided that a villein *other than the king's villein* was not to be thus amerced.[8] Thus, although the Charter was comprehensive in

[1] Below 464-466.

[2] Magna Carta Commemoration Essays, 81, 97, 108-110.

[3] In 1331 the statute 5 Edward III. c. 9 enacted that, "*No man* from henceforth shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels seised into the king's hands against the form of the Great Charter, and the law of the land;" and in 1354 the statute 28 Edward III. c. 3 enacted that, "No man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law."

[4] For the words of this clause see below 214 n. 10.

[5] "This (§ 39) extends to villeins, saving against their lord, for they are free against all men, saving against their lord," Second Instit. 165; for villein status see vol. iii 491-510.

[6] "Et villanus eodem modo (i.e. salvo contenemento) amercietur salvo waynagio suo:" for the meaning of the words "contenementum" and "waynagium" see E.H.R. xxvii 720-728; the former is derived from "contenir," means social condition or standing, and is represented by the old use of the word "countenance;" the latter is a Latinized form of the French "gagnage," i.e. cultivated lands and crops; cp. McKechnie, op. cit. 291-292, 293-294. It may be noted that, according to the *Très Ancien Coutumier*, though the chattels of offenders were forfeited to the Duke, there were "maximum payments for the various classes of society, and knight and peasant enjoyed exemption of their arms and means of livelihood in a way which suggests the well-known clause of Magna Carta," Haskins, Norman Institutions 185.

[7] McKechnie, op. cit. 118-119.

[8] Ibid 292; cp. Magna Carta Commemoration Essays 80.

its scope, it did not embrace all Englishmen. Why then did the change in the interpretation of the Charter which made it include all Englishmen take place so early? The answer, Sir Paul Vinogradoff has shown,[1] is that the interpretation which excluded villeins was in the first place, difficult of application in the face of the fact of the frequent combination of free birth and unfree tenure;[2] and in the second place it ignored the fact that, from the point of view of the criminal law, and the rights and duties which it involved, the distinction between free and villein was negligible.[3] And so "as the narrow conception of freedom aimed at in the barons' charter did not agree with important doctrines well established in the early common law, the interpretation given to 'nullus liber homo' by the judges was bound to take a different course from that intended by the originators of the document."

(iii) The chief clauses of the Charter.

At the beginning of the Charter stands the clause which guarantees the liberty of the church.[4] This clause naturally holds the first place by virtue of the share which churchmen had taken in securing the Charter. The other clauses of the Charter can be divided into four classes. (*a*) The clauses dealing with what may be called feudal grievances. (*b*) The clauses relating to trade. (*c*) The clauses relating to the central government. (*d*) The clauses which place limitations upon arbitrary power.

(*a*) The clauses dealing with the abuses arising out of the doctrines of tenure were naturally placed first.[5] The baronage, who felt these grievances the most keenly, were the natural leaders of the nation. Reliefs, aids, wardship, marriage, purveyance are some of the subjects with which they deal. I shall deal with them in more detail when I come to speak of the Land Law.[6] They continued to be grievances till the military tenures were abolished in 1660. At this period they were grievances of the first order. I have said that feudalism has its two sides—it is a system of jurisdiction as well as a system of landowning.[7] We expect, therefore, to find clauses dealing with the former as well as the latter side of the subject. Such clauses

[1] Magna Carta Commemoration Essays 80-81.
[2] Above 202; below 264-265; vol. iii 199, 493.
[3] Above 202; vol. iii 494.
[4] § 1, "In primis concessisse Deo et hac præsenti carta nostra confirmasse, pro nobis et hæredibus nostris in perpetuum, quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illæsas." The references are to the Charter of 1215 printed Stubbs (Sel. Ch., 6th ed.) 296-306.
[5] §§ 2-12, 14, 15, 16, 28-32, 37, 43.
[6] Vol. iii 54-73.
[7] Vol. i 17, 18.

there are; but it is a testimony to the success of Henry II.'s reforms that we find many more clauses relating to royal courts and officials than we find clauses relating to purely feudal jurisdiction. The clause which enacts that "the writ præcipe shall not issue so that a man shall lose his court," and possibly the clauses which provide for the *judicium parium*, are the only two which directly favour feudal ideas of jurisdiction.[1] The constitution of the commune concilium is, it is true, purely feudal.[2] It is to be composed only of tenants in chief; but it should be observed that it is contemplated that the object of its meeting will be purely feudal. The sixty-first clause, dealing with the mode by which the barons hoped to secure observance of the Charter, is the clause which is most strongly influenced by feudal conceptions of politics. Private war was the natural remedy for any grievance, public or private, in 1215.[3] The crown and the prerogative had not as yet gained those mysterious attributes which in later days lawyers and theologians will conspire to invent. The king is a lord; and it was no unusual thing to renounce allegiance to a lord and formally to proclaim war.[4] The men of 1215 lived in a simpler age than the men of 1688. They saw no difficulty in appointing a committee of twenty-five persons who, "with the community of the whole land, shall distrain and distress us in any way they can, namely, by the taking of our castles, lands, and possessions, and in all other possible ways, until redress has been made according to their will, saving only our person and that of our queen and children; and when redress has been made they shall show such obedience to us as they showed before."[5] The body which will represent the "communa totius terræ" and bring peaceable pressure to bear upon the king does not as yet exist. The "commune concilium" does not as yet represent the "communa totius terræ."[6]

(*b*) The clauses relating to trade. The baronage could not do without the towns. In the alliance made in 1215 one of the most distinctive features of the future parliament is foreshadowed —the absence of any separate estate of the merchants. London

[1] §§ 34, 39, vol. i 58-63; vol. iii 6.
[2] § 14, vol. i 55-56.
[3] P. and M. ii 503, 505; vol. iii 288, 461-462; cp. Matthew Paris (R.S.) iii 249, 258.
[4] Vol. iii 461-462.
[5] "Cum communa totius terræ distringent et gravabunt nos modis omnibus quibus poterunt, scilicet per captionem castrorum, terrarum, possessionum, et aliis modis quibus poterant, donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et reginæ nostræ et liberorum nostrorum; et cum fuerit emendatum intendent nobis sicut prius fecerunt."
[6] Vol. i 55, 352; below 302-304, 429-434.

and all other cities are to enjoy their liberties and customs.[1] There is to be one uniform standard of weights and measures.[2] All merchants are to have free ingress and egress to and from England save only in time of war; and they are not to be subjected to unjust taxation.[3]

(*c*) The clauses relating to the central government. These clauses show clearly the strides which had been made in the establishment of orderly government since the grant of Henry I.'s charter. They show, too, that the new institutions created by Henry II. had taken root. We have seen that the place of the court of Common Pleas and the times for holding the assizes were fixed;[4] and that regulations were made for securing the impartial trial of the pleas of the crown.[5] The Charter accepts these institutions as part of the established order of things.

(*d*) The clauses which place limitations upon arbitrary power. Some of these clauses foreshadow the methods of other great constitutional enactments of English history. They ask for no violent change—simply for a reformation of particular abuses in specific branches of the law. Amerciaments inflicted by the courts were to be "salvo contenemento."[6] Regulations were made as to the property to be taken in execution for debt.[7] Provision was made for the administration of the property of deceased persons.[8] Perhaps the most general and the vaguest of all these clauses was that which directed that only those who knew the law and intended to keep it were for the future to be appointed the servants of the crown[9]—an ideal which will task the ingenuity of many generations of lawyers.

The most famous of these clauses are the 38th, the 39th, and the 40th.[10] It was said in the seventeenth century that these

[1] § 13, "Et civitas Londoniarum habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras, quam per aquas. Præterea volumus et concedimus quod omnes aliæ civitates, et burgi, et villæ, et portus, habeant omnes libertates et liberas consuetudines suas."

[2] § 35.

[3] § 41.

[4] §§ 17, 18, vol. i 56.

[5] § 24, vol. i 57.

[6] § 20, "Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti; et pro magno delicto amercietur secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur salvo wainagio suo, si inciderint in misericordiam nostram; et nulla prædictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto;" above 211 n. 6.

[7] § 9; §§ 10, 11 deal with debts due to the Jews—a kind of property in which the crown had a very direct interest, vol. i 45-46.

[8] § 27, vol. i 626; vol. iii 535.

[9] § 45, "Nos non faciemus justitiarios, constabularios, vicecomites vel ballivos nisi de talibus qui sciant legem regni, et eam bene velint observare."

[10] § 38, "Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis." § 39, "Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium

clauses embodied the principles of the writ of Habeas Corpus[1] and of trial by jury;[2] and for these interpretations early mediæval authority could be cited.[3] It is not difficult to show that, taken literally, these interpretations are false. Trial by jury was as yet in its infancy.[4] The writ of Habeas Corpus was not yet invented; and, as we shall see, it was long after it was invented that it was applied to protect the liberty of the subject.[5] But there is a sense in which these interpretations are true. These clauses do embody a protest against arbitrary punishment, and against arbitrary infringements of personal liberty and rights of property: they do assert a right to a free trial, to a pure and unbought measure of justice. They are an attempt, in the language of the thirteenth century, to realize these ideals—just as the demand for the laws of Edward the Confessor was an attempt, in the language of the twelfth century, to realize the same ideals. It is not until these ideals have been expressed in Magna Carta that we cease to hear the demand for the laws of Edward the Confessor. It is not until the parliamentary contests of the Middle Ages and the technical skill of the common lawyers have provided more perfect securities for freedom and justice that we cease to hear the demand for the confirmation of the Charter. This is the real sense in which trial by jury and the writ of Habeas Corpus may claim descent from these clauses of the Charter. The historian may prove that there is no strict agnatic relationship: he must admit that there is a natural—a cognatic link.[6]

(iv) The historical importance of the Charter.

The history of our public law from the time of the granting of the Charter is the best commentary upon the nature and extent

suorum vel per legem terræ." § 40, "Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam."

[1] Coke, Second Instit. 52, 53, commenting on § 39 (§ 29 in Henry III.'s reissue) mentions the writ of Habeas Corpus; but he distinguishes the judicium parium from trial by jury.

[2] Selden, Notes on Fortescue De Laudibus c. 26, and Hale, History of the Common Law (ed. 1820) 49, identify trial by jury with judicium parium; Blackstone also, Comm. iv 342-343, takes this view.

[3] In the trial reported in Y.B. 30, 31 Ed. I. (R.S.) 529 seqq. the accused at p. 531 objects to the jury because he is a knight, "et non debeo judicari nisi per meos pares;" the judge assents, "quia vos estis miles, volumus quod vos sitis judicati per vestros pares," and causes knights to be sworn on the petty jury. In Y.B. 32, 33 Ed. I. (R.S.) 516 there is a discussion of the meaning of "lex" in § 28 of the Charter of 1225; the first meaning suggested, that no one is to be placed on a jury unless properly summoned, obviously points to the use of the term "lex" in the larger sense. For the two possible senses of "lex" in § 39 of the Charter of 1215 see vol. i 60-63; there is no doubt that the word was taken in the larger sense a little more than a century after 1215, see the statutes cited above 211 n. 3; R.P. ii 297, 42 Ed. III. nos. 20-28; Coke, Second Instit. 50; cp. L.Q.R. xxi 255.

[4] Vol. i 323, 324.

[5] Bk. iv Pt. II. c. 6 § 3; cp. vol. i 227, 228.

[6] See Powicke, Magna Carta Commemoration Essays 113-121.

of its importance. The Charter was constantly appealed to all through the mediæval period, and during the constitutional conflicts of the seventeenth century; and, after those conflicts had been settled, its observance came to be regarded both by lawyers and politicians as a synonym for constitutional government. It is only in these last days that its interest has come to be mainly, if not wholly, historical.[1] Like the classical Roman law, it has lost its political and practical importance; and, on that account, it has become possible to study it, as the classical Roman law is now studied, with scientific impartiality.[2] All this we shall see in succeeding chapters and Books of this History; and it is only necessary at this point to indicate very briefly the place which the Charter holds in relation to the century before and the century after 1215.

The account which I have just given of those of its clauses which place limitations upon arbitrary government will show us that in the Charter we get the first attempt to express in exact legal terms some of the leading ideas of constitutional government. It was the first of many like services which the new common law was destined to perform. There is no attempt to destroy the foundation of law and of orderly government which the crown has laid. But it has become clear that there is a united "communa totius terrae" which both desires some share in the government, and has the power and the will to correct abuses in the administration of the law. The period in which the law is developed by the power of the crown alone is over: the period which will end in the establishment of a body which will limit the power of the crown and share in the making of laws is begun. How to organize this body is the problem of the following centuries. Meantime the common law is safe. The king himself is restrained; but the law remains. With the perfecting of the restraints upon the royal power it will remain supreme.

[1] Magna Carta Commemoration Essays 12-13.

[2] On this change in the importance and methods of study of Roman law, which presents a close parallel to the importance and modes of study of Magna Carta, see P. F. Girard, L'Enseignment du Droit Romain en 1912.

CHAPTER III

THE REIGN OF HENRY III

The Progress of the Common Law

TO the political historian the reign of Henry III. is a disturbed and a distracted period. The earlier part of the reign is taken up with the history of the struggle against foreign and papal influences; the later part of the reign with the history of the struggle against Henry's own misrule. To the constitutional historian the reign is more interesting, both because we see the first attempts to solve the problem raised by the granting of Magna Carta—the problem of combining an efficient executive with some sort of national control over that executive; and because it is a period of much political speculation,[1] and of many temporary expedients to secure a competent government. It is to the legal historian that this reign is the most interesting. In spite of much disorder it is a period of continuous growth. The institutions created by Henry II. still do their appointed work. The courts sit at Westminster or elsewhere. The judges go their circuits. In spite of civil war the machine of government is never actually stopped.[2] As a result English law takes a long step towards becoming such a coherent and definite body of rules that it can fitly be compared with the civil and canon law.

English law as we see it summed up in the work of Bracton is an achievement of which any nation may well be proud. From the accession of Henry II. (1154) to the death of Bracton (1268) is a period of a little over one hundred years. Within that short period the legislative reforms of a king who was a born administrator had been enforced and logically developed by men who had imbibed through the canon law much of the "Geist der Romischen Rechts." Words and ideas were, as we shall see, copied. But there is much more than mere copying. The English judges were exhibiting the substance of those qualities which have made Roman law eternal: like the Roman prætor and

[1] Below 252-256.

[2] Once, in 1224, the itinerant justices were attacked by order of Falkes de Breauté, Wendover (R.S.) iv 94; Mat. Par. (R.S.) Chron. Min. ii 263. Sometimes cases were adjourned because it was a time of war, Bracton's Note Book, cases 1492, 1528.

jurisconsult, they were developing from the customary law of small districts the general rules, which could serve not only for a state, but also for an empire comprising many nations and languages. Englishmen will not readily modify the rules of their law in order to bring them into conformity with the rules of an alien code. The famous "Nolumus leges Angliæ mutare" of the Parliament of Merton (1235-1236) expresses, no doubt, a "national conservatism."[1] It may well express also a national pride in the nation's own peculiar law.[2]

If we look merely at the political and constitutional events of the reign—at the civil wars, and at the experiments in the manufacture of constitutions—we may well wonder at the extent and permanence of Edward I.'s work. But if we look, not at these dramatic events, but at the history of the law as it was gradually evolved by the steady working of the central courts and the local institutions, there is no cause for wonder. Edward I. had the advantage of being able to build upon the firm foundation of a national law administered by a centralized judicial system, a centralized executive, and an organized system of local government in close touch with both the judicial and the executive system.

In this chapter I shall deal with the causes for and the character of the development of the common law in the reign of Henry III. In the first place I shall say something of the various sources of law in this period—the statutes, the records, and the judges and their work; I shall then say something of Bracton's masters and of Bracton's life and work; and lastly I shall attempt to sketch the state of the law as it appears in Bracton's works, and to give some account of their influence upon the history of English law.

During the disturbances of this reign the additions made to the law by direct legislation were not numerous. Magna Carta

[1] Bracton's Note Book i 104-108; Maitland, Canon Law 53-56; Law Magazine and Review (1896-1897) xxii 245-250. This clause of the Statute of Merton really reports a resolution arrived at in 1234 (below 221). The text of that resolution, taken from the Coram Rege roll, is printed in vol. 2 of the R.S. edition of Bracton at p. 607. The text of the 9th chap. of the Statute of Merton relating to the matter runs as follows: "Ad breve Regis de bastardia, utrum aliquis natus ante matrimonium habere poterit hereditatem sicut ille qui natus est post, responderunt omnes Episcopi quod nolunt nec possunt ad istud respondere, quia hoc est contra communem formam ecclesiæ. Ac rogaverunt omnes Episcopi Magnates, ut consentirent quod nati ante matrimonium essent legitimi sicut illi qui nati sunt post matrimonium quantum ad successionem hereditariam quia ecclesia tales habet pro legitimis, et omnes Comites et Barones una voce responderunt quod nolunt leges Angliæ mutare quæ usitatæ sunt et approbatæ," Statutes (R.C.) i 4.

[2] P. and M. i 168. Cp. Bracton's Note Book, case 1227 (as to the division of the county palatine of Chester) all the council say that the case was wholly new, but, "nec voluerunt judicare per exempla usitata in partibus transmarinis."

at once took the place, which it occupied right up to the eighteenth century, as the most important, the most fundamental part of the enacted law. "A writ," says Bracton, "fails if it is contrary to the law and customs of the realm and especially if it is contrary to the charter of liberties;"[1] and in 1369 Parliament attempted to render void any statute which infringed its provisions.[2] It was reissued in a modified form in 1216 and 1217; and in the latter year the clauses relating to the Forests were omitted and embodied in a separate Forest Charter.[3] It obtained its final form in the reissue of 1225, made on the attainment by Henry III. of his majority; and it is in this form that it appears upon the Statute Book. As Mr. McKechnie points out, between 1215 and 1225 the Charter "had, like a living thing, adapted itself to changing needs and grievances."[4] For the future, additional securities against arbitrary government were provided by fresh legislation.[5] But the fact that the Charter was considered to be the chief of these securities is shown by the fact that during the Middle Ages it was confirmed some thirty times.[6] Henry III. himself was obliged to confirm the Charter on several occasions; and in 1253 sentence of excommunication was threatened against all who took even the humblest part in infringing or altering its clauses, or the clauses of the Charter of the Forest.[7] From the point of view of the history of private law the most important additions to the Charter were the clauses which attempted to regulate the power of the free tenant to alienate his land, and to impose some limitations upon gifts of land to religious houses.[8] We shall see that both these matters were the subject of important statutes in Edward I.'s reign.[9]

There are as yet no external tests by which we can distinguish legislative from administrative acts. The earliest Statute Roll begins in 1278. The earliest Parliament Roll is of the year 1290.[10] No doubt important political acts and important legislative changes required the counsel and consent of the deliberative

[1] "Item cadit breve si impetratum fuerit contra jus et regni consuetudinem et maxime contra cartam libertatis," f. 414.

[2] 42 Edward III c. 1. "It is assented and accorded that the Great Charter and the charter of the Forest be holden and kept in all points; and if any statute be made to the contrary that shall be holden for none;" see Coke, Second Instit. Pref.

[3] For an account of these reissues see McKechnie, op.cit. 139-159; Adams, Origin of the English Constitution 256 seqq.; for the texts see Stubbs, Sel. Ch. 339, 344.

[4] Op. cit. 158. [5] Ibid.

[6] Coke, Second Instit. Pref.

[7] Stubbs, Sel. Ch. 373-374; the sentence includes all who infringe the Charters, "clam vel palam facto, verbo, vel consilio"; and all who attempt to pass other laws contrary thereto, and not only those who counsel and enforce them, but even the scribes who pen them.

[8] §§ 39 and 43. [9] Below 300.

[10] P. and M. i 159 n. 3; below 420-423.

body of the nation; and the resolutions arrived at by such a body could not be lightly repealed.[1] This still left a large discretion to the king; and, in fact, a large discretion was needed in order to carry on the centralized government established by Henry II. No very definite limitations were yet established. Either the king was left very free to do as he pleased or his royal power was practically placed in commission.[2] No permanent controlling body, equal in stability to the centralized organization of the executive government and possessing rolls of its own, is as yet recognized.

We have, therefore, only second-hand evidence of miscellaneous administrative and legislative acts. With an account of the actual clauses passed we have accounts of debates upon clauses which were not passed. "The command of the sovereign" is sometimes expressed in a very narrative and discursive form.[3] For these accounts we must look in various places—in the Patent and Close rolls, in the Coram Rege rolls, in the statements of legal writers and chroniclers. We cannot be sure that we know as yet all that the rolls contain. We shall see that an important ordinance was unearthed as lately as 1896.[4] It is not till the final form of the constitution has been fixed under Edward I. that we get first-hand evidence of the doings of Parliament. It is not till nearly the close of the Middle Ages that we can clearly distinguish between statutes and legislative acts less solemn than statutes. Even at the close of the Middle Ages the limitations upon the administrative powers of the crown were by no means accurately drawn.

The following are the most important enactments of Henry III.'s reign :—

The Statute of Merton[5] of 1235-1236, as printed by the Record Commissioners, deals with (1) damages in actions of dower, (2) the right of widows to bequeath the crops on their dower lands, (3) redisseisin, (4) approvement of common, (5) usury, (6) and (7) ravishment of ward, (8) limitation of writs, (9) bastardy, (10) attorneys, and (11) trespasses in parks. It

[1] Bracton f. 1b, "Hujus modi vero leges Anglicanæ et consuetudines regum auctoritate jubent quandoque, quandoque vetant, et quandoque vindicant et puniunt transgressores; quæ quidem cum fuerint approbatæ consensu utentium et sacramento regum confirmatæ mutari non poterunt, nec destrui sine communi consensu et consilio eorum omnium, quorum consilio et consensu fuerunt promulgatæ;" P. and M. i 160 and authorities there cited.

[2] See the Provisions of Oxford of 1258, Stubbs (Sel. Ch.) 387-396.

[3] Above 218 n. 1; the 11th clause of the Statute of Merton as printed in the Record Comm. edition is as follows, "De malefactoribus in parcis et vivariis non est discussum quia magnates precaverunt propriam prisonam suam de illis quos capent in parcis et vivariis suis; quod quidem Dominus Rex contradixit, et ideo differt;" cp. Ilbert, Legislative Methods and Forms, 4, 5.

[4] Below 221 n. 12.

[5] Statutes (R.C.) i 1.

would appear that only the first five and the eleventh clauses were discussed at this Parliament. There is no contemporary reference to the sixth and seventh clauses, though forty years after they were considered to be law. Possibly they were consented to by the Council at a later date. The ninth and tenth clauses had already been dealt with in 1234. The latter is on the Coram Rege roll, the former on the Close roll of that year. The eighth clause is on the Patent roll of 1237.[1] The Provisions of Westminster were forced upon the king in 1259.[2] The king and his party hardly regarded them as law. But they were in substance re-enacted in 1267, after the civil wars were over, as the Statute of Marlborough.[3] This statute deals with a very miscellaneous collection of topics, of which some of the most important are wrongful distress, fraudulent conveyances, wardship, redisseisin, suits of court, false judgment, entry in the post. There are many other measures dealing with small isolated points which are rather administrative than legislative. One of them has taken its place in the Statute Book among the statutes of this reign. It is a writ of 1256 to the justices of the bench relating to the manner in which the extra day in leap year is to be counted.[4] Of the others we have an ordinance of 1219 relating to the abolition of the ordeal;[5] an ordinance of 1233 relating to the preservation of the peace;[6] an ordinance of 1234 relating to special bastardy;[7] an ordinance of 1237 relating to the limitation of actions;[8] an ordinance of 1248 relating to the coinage;[9] an ordinance of 1251 relating to warranty;[10] an ordinance of 1253 relating to watch and ward;[11] an ordinance of 1256, in the form of a writ to the sheriff of Yorkshire, forbidding tenants in chief to alienate their lands without the licence of the crown;[12] an ordinance relating to the custody of prisoners not yet convicted.[13]

[1] Bracton's Note Book i 104, 105; Law Magazine and Review (1896-1897) xxii 245-250. It should be noted that Bracton f. 98 cites the 2nd clause from the Coram Rege roll of 18 Henry III. i.e. 1234. It has been suggested either that he mistook the date of the Parliament of Merton; or that the various resolutions arrived at by the Council were discussed and affirmed at Merton; or that it was merely another instance of the complete confusion as to the date of the Statute of Merton which Bracton shows in dealing with the 9th clause, Bracton's Note Book i 109-116; below 235 n. 2. But Mr. Woodbine has given good reasons for thinking that, when dealing with the 2nd clause, Bracton really wrote 20 Henry III. and that 18 is only a copyist's error, L.Q.R. xxvi 151-153.

[2] Statutes (R.C.) i 8. [3] Ibid i 19. [4] Ibid i 7.

[5] Vol. i 311, 323 n. 10. [6] Stubbs (Sel. Ch.) 362.

[7] Above 218 n. 1. [8] Bracton's Note Book i 106.

[9] Mat. Par. Chron. Maj. (R.S.) v. 15, 18, cited P. and M. i 159 n. 4.

[10] Bracton f. 382b, cited ibid. [11] Stubbs (Sel. Ch.) 374.

[12] This ordinance was discovered in 1896 by Mr. Turner upon the Close roll, in immediate proximity to the ordinance relating to leap year, L.Q.R. xii 299-301.

[13] Bracton f. 137. The Dictum of Kenilworth is printed with the statutes (R.C.) i 12; Stubbs (Sel. Ch.) 419. It simply contains the terms given to the adherents of Simon de Montfort.

The difficulty of deciding what is and what is not a statute is well illustrated by the documents known as the statutes of uncertain date, which are to be found between the statutes of the reigns of Edward II. and Edward III. What are known as the "Vetera Statuta" end with Edward II. What are known as the "Nova Statuta" begin with Edward III. The Nova Statuta were first printed by Pynson in 1497, but the Vetera Statuta were not printed till 1588. This division, therefore, is due to the arrangement of the earliest printed copies of the statutes, which probably followed a still earlier arrangement of the MSS.[1] Those who made collections of the statutes in the sixteenth century were confronted by an ancient and miscellaneous collection of tracts relating to the administration of the law coming chiefly from the reigns of Henry III. and Edward I. They clearly contained old expositions of the law. Some appeared to be legislative in form. It would not do to omit them; and therefore they were grouped together and printed between the two series. A list of them will be found in the Appendix.[2]

They come from very various sources. Some are merely tracts taken from current law treatises. Thus the Statutum de Tenentibus per legem Angliæ is simply an extract from Glanvil, Book vii chap. 18.[3] The Statutum de Magnis Assisis et Duellis is taken from a tract known as Brevia Placitata, the date of which is probably 1260.[4] Others are administrative measures defining the duties of officials of the Government. Such are the articles of the Eyre, the articles of the office of coroner, the articles of enquiry on the Statute of Winchester, the view of frankpledge, the forms of oaths to be taken by various officials. Others are ordinances providing for matters which it was considered to be the duty of the crown to regulate. Such are the assize of bread and ale, the statute concerning bakers, the statutes relating to money, weights, and measures. Others are merely rules relating to the procedure of the courts. Such are the Dies Communes in Banco, the Dies Communes de Dote,[5] the manner of levying fines, the manner of challenging essoins. Others contain summaries of existing law and practice upon important topics. Such are the Customs of Kent, the Præ-

[1] Cooper, Public Records i 125; for the various printed editions of the statutes see Bk. iv Pt. I. c. 2; that the printers followed an older arrangement appears probable from the fact that we find this division in a will of 1432, Test. Ebor. (Surt. Soc.) ii 27.

[2] App. III.

[3] Law Magazine and Review (1895-1896) xxi 301.

[4] Ibid.

[5] For the origin of the dates of the law terms, and the days in these terms for the returns of writs, see vol. iii App. VII.

rogativa Regis.[1] the rules relating to homage, fealty, reliefs, wardships, the Extenta manerii, and another version of the Statute of Conspirators of 1293.[2] It is only a few that can really be called statutes. The Statute of the Exchequer was probably passed in 1275; and the Statute of the Jewry was probably passed in the same year. The Statute of Exeter was probably passed in 1292.[3]

In fact, the distinction between the Vetera and the Nova Statuta, though the accidental result of the arrangement of the MSS. which went to the printers, really corresponds, as Hale[4] has pointed out, to a substantial dividing line. "The statutes made in the times of those kings" [Henry III., Edward I. and II.], he says, "I call the old statutes; partly because many of them were made but in affirmance of the common law; and partly because the rest of them, that made a change in the common law, are yet so ancient that they now seem to have been, as it were, a part of the common law; especially considering the many expositions that have been made of them in the several successions of times, whereby as they became the great subject of judicial resolutions and decisions, so those expositions and decisions, together also with those old statutes themselves, are as it were incorporated into the very common law, and become a part of it." Just as the older monuments of Roman law, such as the Twelve Tables, the Republican statutes and the Prætor's Edict, ceased to be cited in their original form because they had passed into the general body of the law expounded by the jurisconsults of the later imperial period, so these older sources of our law have become so established a part of it that it is rarely necessary to cite the actual statute, if actual statute there was, which has made the law.[5]

I have already mentioned some of the principal classes of records to which the growth and development of the various

[1] For this Tract see vol. i 473 n. 8; as to its date see E.H.R. v 753; note that it was accepted as a statute in Edward III.'s reign, Y.B. 16 Ed. III. (R.S.) i 134; but in Willion v. Berkeley (1561) Plowden at p. 240 it is referred to as a "statute or treatise."

[2] For conspiracy see below 301, 366; vol. iii 401-407; and for the later history of the law Bk. iv Pt. I. c. 3, and Pt. II. c. 5 § 2.

[3] Law Magazine and Review xxi 307-315. It is said at p. 310 that a statute of 55 Henry III. relating to the Jewry, and found on the Patent roll, is the earliest legislative act to call itself a "statutum."

[4] Hist. Comm. Law 9.

[5] Girard, Droit Romain 70, "Au lieu de remonter aux textes originaux des lois, des sénatus consults, des édits par exemple, on prennait comme textes les ouvrages des commentateurs suivant un pratique qui aurait, en vertu de la *permissio jura condendi*, remonté, d'après certains interprètes modernes, à Hadrien ou même à Auguste, qui en réalité inconnue alors, mais qui dut se developper normalment à mesure que la valeur des jurisconsultes présents diminuer et que l'admiration pour les jurisconsultes passés s'accrut."

departments of government had given rise.[1] We have seen that their number tended to increase during this period by reason of the growing distinctness of these different departments. The same cause gives rise to a distinct class of records—the Precedent Books or Registers.[2] They hold a place intermediate between the official rolls and the connected literary treatise, such as the Dialogus de Scaccario. They contain transcripts from original documents dealing with some one department or some one subject collected and arranged for easy reference.

Here, as in other branches of record-making, the Exchequer was the pioneer. In the two Black Books[3] and in the Red Book of the Exchequer[4] we have perhaps the earliest instances of this kind of compilation. In later times the example of the Exchequer was extensively followed. We have seen that in Henry VI.'s reign the Court of Admiralty acquired its Black Book.[5] The Court of Augmentations possessed a series of precedent books. From the period of the Restoration the War Office possesses a series of entry books. Many corporate towns made similar collections; and the great landowners, lay and ecclesiastical, possessed registers and cartularies which were used for their possessions in the same manner as the official publications were used for the department of state to which they referred.[6] "We may not only assume," says Mr. Hall, "a common motive for the compilation of these registers, but we may go further and specify the common nature of their contents, which will be found in typical cases to comprise some or all of the following subjects: —Charters, Statutes of the Realm, *Placita*, or other public acts, with private Deeds and Ordinances, Correspondence, Chronicles, or Annals, religious, physical or legal treatises, Topographies, Genealogies or Successions, Surveys and Accounts, Precedents and Facetiæ.[7]

The Black Book, in the custody of the king's remembrancer, and the Red Book are the two earliest of the Exchequer registers. Both were probably compiled by Alexander de Swereford;[8] and

[1] Above 180-186.

[2] Scargill-Bird, Guide 316-322. Such registers are received as evidence; but their contents are not, like the contents of the rolls, conclusive, because they are not records, see Y.B. 47 Ed. III. Mich. pl. 48, cited Red Book (R.S.) i ix.

[3] The one formerly belonging to the Exchequer of Receipt, the other to the king's remembrancer.

[4] Edited for the R.S. by Hubert Hall. For some severe criticisms of this work see Round, Studies on the Red Book of the Exchequer. In addition to these works the Exchequer possesses the Registrum Munimentorum Liber A and Liber B, containing diplomatic documents from the reign of Edward I., and the Liber Memorandum Camerarii belonging to the chamberlains of the Exchequer, the entries in which extend from 39 Ed. III. to 35 Hy. VIII.

[5] Vol. i 527, 545-546; Bk. iv Pt. I. c. 3.

[6] Red Book (R.S.) i ii, iii; below 225.

[7] Ibid i iii, iv.

[8] Ibid i lxii.

therefore of Swereford I must say something.[1] Swereford tells us in his preface to the Red Book that he was employed in the Exchequer under the treasurer, William of Ely. As was usual with civil servants, he was rewarded by ecclesiastical preferment. He was Archdeacon of Shropshire, Rector of Swereford, Canon and Treasurer of St. Paul's. On several occasions he was employed on diplomatic missions; and in 1234 he was made Baron of the Exchequer. He was engaged in his duties of baron till his death in 1246. Matthew of Paris was his personal friend and his debtor for historical material.[2] He speaks highly of him in his history; and Mr. Hall says that with Swereford "there passed away the last of a long line of literate clerks, reaching back, through an unbroken tradition of Exchequer practice, to the opening years of the twelfth century."[3] We shall see that in other departments of law and government the growing specialization of these departments was tending to produce a change in the character of the king's servants. The same man can no longer be at once a lawyer, a diplomat, a civil servant, a churchman, and a man of letters.[4]

The Black Book is the earlier of the two treatises. It probably dates from the reign of John; and it was perhaps compiled by Swereford before he began the Red Book. It contains, as does the Red Book, the *cartæ* of 1166,[5] and other documents included in the Red Book. Swereford tells us that he compiled the Red Book in order that the crown might have some permanent record of the liability of its tenants for scutage and other incidents of tenure.[6] The earlier kings had left no rolls. He meant to make a permanent record.[7] The book was therefore, in the first place, a Fœdary—like the Testa de Nevill. It was also a cartulary—it contained a register of surrenders to the crown and other documents relating to dealings with the crown's property. It was an entry book for state papers, statutes, and other public documents affecting the Exchequer, as well as for departmental precedents and memoranda.[8] Later additions were made down to the end of Edward III.'s reign; and between the reign of Henry VI. and

[1] Red Book (R.S.) i xxxv-xlix.

[2] Above 175; he says of Swereford, Hist. Major iv 587, "similem sibi in Anglia non reliquit."

[3] Red Book (R.S.) i xlix.

[4] Below 229-230.

[5] Above 183.

[6] Red Book, Preface, "Residens ego Alexander Archidiaconus Salopesbiriæ apud Westmonasterium in Regis Scaccario, antiquorum regum Angliæ rotulos revolvens annales, ad hoc solicitius animum direxi, ut per regna Angliæ debita Regi servitia militaria quatenus potui plenissime percunctarer."

[7] Preface 4. Mr. Round, differing from Mr. Hall, has formed a most unfavourable estimate of the accuracy of Swereford's statements about early history, Feudal England 262 seqq.; Studies on the Red Book of the Exchequer.

[8] i vi-viii; see the summary of its contents ibid lxv-cxlviii.

that of Elizabeth some smaller additions were inserted on the fly-leaves at the beginning and end of the book.[1]

By far the largest contribution to the growth of the law during this period was made by the steady work of the judges of the royal courts. We have seen that the increase in their work was gradually producing distinct tribunals.[2] This in its turn produced important effects upon the personnel of those who administered the law, and, ultimately, upon the law itself.

In the preceding period the eminent judge had also been an eminent statesman. Glanvil, Hubert Walter, and Hubert de Burgh were far more than mere lawyers. In this period we get the rise of a number of professional judges, who, beginning their career as royal clerks, gradually made their way to the bench and gained their reputation as lawyers. Perhaps Stephen de Segrave,[3] who succeeded Hubert de Burgh as justiciar (1232), marks the transition period. He was the last of the great justiciars. In 1217 he had been one of the justices of the bench. After the fall of De Burgh he and Des Roches were the most powerful men in the kingdom. Though a selfish politician, he was admittedly an able lawyer; and we can see from what Matthew of Paris says of him that law is becoming distinct from politics. The same man may be praised as an able judge and blamed as an unscrupulous politician.[4] After Segrave's fall in 1234 the office of justiciar was never again permanently filled. Henry began the experiment of personal rule until, in 1258, the barons took the administration into their own hands. During the civil wars which ensued both the party of the barons and the party of the king appointed justiciars.[5] Their authority was necessarily fleeting. After peace had been restored we get, instead of a justiciar, a chief justice of the king's bench.[6] This change is characteristic. It shows us that the administration of the law has passed into the hands of the men who have made their career as royal clerks amid the routine of the Chancery and the courts. It is largely due to this change that at this period the civil and canon law exercised a far more direct effect upon the development of English law than they had exercised in the

[1] Red Book i lxiii, lxiv. In 1445-1446 it was recopied in consequence of a petition to the Council that the old copy was worn and illegible, Nicolas vi 325, 326.

[2] Vol. i 195-197, 204-211, 231-233.

[3] Bracton's Note Book i 49, 50; Dict. Nat. Biog.; Foss, Judges ii 468-472.

[4] Mat. Par. Chron. Maj. (R.S.) iv 169, "Inter primos regni reputatus pro justitiario habitus est, et omnia fere regni negotia pro libitu disposuit, sed semper plus sui amicus quam reipublicæ;" Mat. Par. Hist. Min. (R.S.) ii 371 he is said to be "vir legum regni peritissimus."

[5] Hugh Bigot (1258), Hugh le Despenser (1260), Philip Basset (1261), Foss, Judges ii 153, 154.

[6] Vol. i 205.

preceding period, and a greater effect than they were ever again to exercise at any subsequent period.

The new school of judges, then, were royal clerks and ecclesiastics.[1] At a time when the court of Rome was assuming to itself general powers not only of an appellate court, but also of a court of first instance, a knowledge of the canon law was essential to a man who might at any time be appointed by the pope to hear a case as judge delegate.[2] Even if a man's chief business was in the royal courts, he must still know something of the debateable land which lay between the temporal and ecclesiastical jurisdiction. He must know something of the ecclesiastical courts and their procedure, and something of the canon law which they administered. For important cases the king often retained foreign canonists.[3] But there were many other more ordinary cases; and many Englishmen found it profitable to study the canon law. William of Drogheda,[4] an eminent practitioner in his day,[5] and a teacher of law at Oxford, wrote a book (the *Summa Aurea*) upon the procedure of the ecclesiastical courts, which was praised by Johannes Andrea in the following century. Under these circumstances the royal judges found it expedient as judges, as civil servants, and as ecclesiastics to know something of the canon law.

These royal clerks also knew something of the civil law. It is true that in 1180 Alexander III. forbade monks to study the civil law;[6] that in 1219 Honorius III. forbade its study by priests and clerks;[7] and that Henry III. prohibited its teaching in London.[8] Henry's decree did not apply to the whole of England,[9] and it was clear that, whatever papal decrees might say, the study of the civil law usually accompanied the study of the canon law. Thomas of Marlborough went to Italy to attend the

[1] P. and M. i 183, 184.

[2] Vol. i 583.

[3] Thus Henry III. retained "Hostiensis," and Edward I. the son of the great Accursius; see P. and M. i 101, 102; Stubbs, C.H. ii 116, 117; Savigny, History of Roman Law in the Middle Ages chap. xliii.

[4] Maitland, Canon Law 107-116; E.H.R. xii 625 seqq.; at pp. 645-658, Maitland prints some extracts from the Summa Aurea.

[5] William of Montpellier was elected Bishop of Coventry and Lichfield in 1241; the election was contested; and Montpellier threw up his case when he heard that Drogheda, his advocate, was dead.

[6] C. 5 x, Ne clerici iii 50.

[7] C. 10 x, Ne clerici iii 50. For another supposed bull of Innocent IV. see P. and M. i 103; Bracton and Azo (S.S.) xxvii.

[8] "Mandatum est majori et vice comitibus London quod clamari faciant et firmiter prohiberi ne aliquis Scholas regens de Legibus in eadem civitate de cætero ibidem Leges doceat. Et si aliquis ibidem fuerit hujus modi scholas regens ipsum sine dilatione cessare faciant," Rot. Cl. 19 Henry III.

[9] Selden, Diss. ad Fletam viii 2; Duck, de usu et auctoritate Juris Civilis ii 8. 2, xxxii, xxxiii; P. and M. i 102.

lectures of Azo.[1] Bracton, as we shall see, studied the works of Azo as well as the Digest, Code, and Institutes.[2] John of Lexington, justice of the bench, is said to have been learned "in utroque jure canonico scilicet et civili."[3] It was, in fact, very necessary to combine the two studies. Some knowledge of the civil law was essential to the understanding of the canon law. The duties of the clerks of the Chancery were wide. They embraced foreign as well as domestic business;[4] and it is clear that for the conduct of foreign affairs a knowledge of both codes was essential.

The fact that the royal clerks were thus learned "in utroque jure," and the fact that the bench was manned by these learned clerks, has a very direct bearing upon the development of the law. Among the domestic and more especially legal duties of the clerks of the Chancery was the issue of original writs. In the fulfilment of this duty their knowledge of civil law stood them in good stead. They could quickly and easily devise the new forms needed to meet the new cases.[5] The judges before whom these writs came—such men as Martin Pateshull, William Raleigh, Robert of Lexington, William of York, and Henry of Bracton—could understand their meaning and could give to them their full effect. According to Bracton[6] full effect should always be given to a writ, even if its form was unusual, provided that it was not directly contrary to law; and, even if by special favour an unusual form of writ was devised, the judges must uphold it, provided the Council have not expressly dissented. It is clear that doctrines such as these will make for a rapid expansion of the law.

In fact, it is doubtful if less learned men could have dealt with the many varied cases which in this period of rapid development came before the king's court. To understand, for instance, the

[1] Bracton and Azo (S.S.) ix, x; below 267 n. 6; cp. Y.B. 3, 4 Ed. II. (S.S.) xviii, xix.

[2] Below 232-233.

[3] Diss. ad Fletam viii 2.

[4] Vol. i 317 n. 1, 417-418. It is significant that in Bracton's Note Book, case 1095, a compromise is dated by the day (July 24, 1177) when Frederic I. made peace with the pope.

[5] Duck, de usu etc. ii 8. 3. xi, says, "Brevia autem et rescripta in Registro magna cum brevitate, acumine, et judicio fuisse conscripta a viris peritis legum Romanarum, legentibus satis constat, idque mihi sæpius observavit et retulit *Gulielmus Noyæus*, nuper apud nos procurator Regis . . . eademque Brevia habemus in Registro diserte et acute composita a clericis hujus Curiæ, quibus hoc munus a statuto demandatum est."

[6] f. 414b, "Si autem (breve) præter jus fuerit impetratum, dum tamen fuerit rationi consonum et non jure contrarium, erit sustinendum, dum tamen a rege concessum et a consilio suo approbatum. Sed esse debet personale, sed non debet concedi nisi de gratia speciali, nec refert utrum magnates expresse non præbuerint assensum, dum tamen expresse non dissentiverint, nec ostensa ratione sufficienti quare valere non debeat, pertinet enim ad regem ad quamlibet injuriam compescendam, remedium competens adhibere, brevia tamen communia inter omnes pro jure generaliter debet observari;" Bracton's Note Book cases 1215, 1930 note.

mercantile bond of the period, a knowledge of the common law, the civil law, and the canon law was required. "The conveyancer of Henry III.'s day ought to have a little of several kinds of law. When he drew a will he drew a document the validity and interpretation of which would be a matter for the ecclesiastical courts, and when he drew a bond he drew a document which he hoped would hold good by whatever law it might be tested."[1] In the new school of judges we find the many-sided men required to understand the various laws which governed different men and different transactions, and to define the relation of these different laws to the common law which they were both making and administering.

Towards the end of the reign there are signs that the business of state was becoming still further divided. The judges were not always clerks. The law was not exclusively a clerical profession. Thomas de Muleton, Robert de Thurkilby, and Henry of Bath were judges who were laymen.[2] Thomas de Brok was perhaps the first man who, on account of his reputation as a practitioner, was raised to the bench.[3] We shall see that in Edward I.'s reign these tendencies became stronger. The law tended to become a close profession. The bench tended to be recruited from among those who had passed their lives practising at the bar. This means that the study of the law will become a thing apart. Lawyers will not be men who know something of other systems besides their own. All danger that the Roman law will be regarded as a kind of supplementary law to eke out the deficiences of English law will cease. But there will be a danger that the intensely national character thus gained by English law will mean a narrow, a crabbed, a pedantic development.[4] Bracton perhaps saw the beginning of the change. The "milites literati" were not the purest of the judges.[5] Perhaps their learning seemed small to a clerical justice. He tells us that one of the causes which moved him to write his treatise was the fact that unlearned

[1] L.Q.R. vii 68, article by Maitland upon a conveyancer of the thirteenth century. For a specimen of such a bond see Rievaulx Cart. (Surt. Soc.) App. no. 92, a loan by Hugelino de Vithio and Lotherius Bonaguide and their partners, citizens and merchants of Florence, to the abbot of Rievaulx; Madox, Form. no. 474—a "perpetual emphyteusis" made by the monks of Lucerne to John de Torville (1306).

[2] P. and M. i 184. [3] Foss, Judges ii 267.

[4] See on the whole subject, Y.B. 3, 4 Ed. II. (S.S.) xix-xxi.

[5] Matthew of Paris says of Thomas de Muleton (Chron. Maj. iv 49), "Hic dum fines suos cupiebat ampliare, abbatiæ Sancti Guthlaci, cujus prædia suis erant contermina, multotiens intulit dampnum et gravamen;" ibid v 213 a tale is told of the corruption of Henry of Bath, who, urged by his wife, "hinc indeque munera receperit ambidexter," so that he was the richest of the judges; ibid v 138 he tells us that Robert of Lexington, who, though a cleric, was not always clerical in his conduct (P. and M. i 184, n. 2), "amplissimas sibi possessiones adquisierat" by long holding office; cp. Liber Mem. de Bernewelle 124, 125 for a tale of oppression.

and dishonest men had ascended the judgment seat and were perverting the law.[1] More than once he eloquently portrays the future fate of those who thus pervert the law for temporal gain[2]—a warning needed by the judges of that age and for many years to come.[3] In writing his treatise he deliberately chose to rely upon earlier rather than upon later decisions. Martin of Pateshull and William Raleigh were his authorities. Even Segrave was hardly mentioned.[4] This may be due to the fact that he had the rolls of Pateshull and Raleigh. It may be due to the fact that the political unrest had led to the formation of rival schools among the lawyers, such as we find at Rome after the establishment of the Empire, such as we find in England in the seventeenth century.[5] It may be that the reasoning of judges who were canonists as well as common lawyers was more satisfactory to his mind. It may be due to the accidents of birth and education.[6] It may be that the lawyers of that day, and especially Pateshull, had the reputation of being the ablest lawyers that England had yet seen.[7] However that may be, Bracton has summed up in his works the progress which had been made before the law became a lay and a close profession. We shall see that in this way much was preserved for the common law which might otherwise have been lost. But for the work of Bracton, which enshrined the ideas and principles of the most creative period in the early history of that law, we may well doubt whether it would have possessed sufficient vitality and elasticity to continue to be supreme in an expanding and a progressive state.

I shall deal first with Bracton's masters and then with the life and works of Bracton himself.

Martin of Pateshull[8] was one of John's clerks. He became a justice of the bench in 1217; and in 1224 he was one of the itinerant justices whom Falkes de Breauté attacked. "In any list of the regular justices Pateshull's name so constantly precedes

[1] f. 1, "cum autem hujusmodi leges et consuetudines per insipientes et minus doctos (qui cathedram judicandi ascendunt antequam leges didicerint) sæpius trahantur ad abusum; et qui stant in dubiis et in opinionibus multotiens pervertuntur a majoribus, qui potius proprio arbitrio quam legum auctoritate causas decidunt."

[2] ff. 2, 106b, 108.

[3] Vol. i 505 n. 8; below 294-299, 564-566.

[4] Bracton's Note Book i § 6.

[5] Ibid i 52.

[6] Below 232.

[7] R.P. i 66 (19 Ed. I. no. 1) would seem to give some countenance to such a claim on behalf of Pateshull. A difficult point of law arose in a suit brought by the widow of Thomas of Weyland, one of the judges disgraced by Edward I. (below 297). The record runs, "Quia casus consimilis nunquam antea evenit prædictus Comes Domino Regi supplicavit quod præcipere vellet scrutari rotulos de Itineribus Just. de antiquis temporibus *ut de tempore Martini de Pateshull* et aliorum Justic. antea et post; et etiam Rot. tam de Banco quam de Cancellaria et de Scaccario de consimili casu si invenire poterit." Of course it may be that this mention is simply due to the place which he has in Bracton's works.

[8] Bracton's Note Book i 45; Dict. Nat. Biog.; Foss, Judges ii 438-440.

all others that he must have enjoyed some pre-eminence, though perhaps not of a very definite kind."[1] He was archdeacon of Norfolk and dean of St. Paul's. His capacity for hard work was such that a brother justice asked Hubert de Burgh to excuse him from going on circuit with him on the ground that he wore out his colleagues by his incessant activity.[2] Of his abilities as a lawyer Bracton's appreciative citations speak eloquently. He is perhaps the first judge who gained his reputation as a lawyer pure and simple. He died in 1229[3]—"vir miræ prudentiæ, et legum regni peritissimus." William of Raleigh[4] was a native of Devonshire. He was presented to the living of Bratton Fleming in 1212. This, as we shall see, was probably Bracton's birthplace; and Bracton may well have begun the study of the law as his clerk.[5] He was a justice of the bench in 1228. In 1234 he pronounced the reversal of De Burgh's outlawry; and, though not justiciar, was regarded as the chief among the judges. In 1237 he was treasurer of Exeter Cathedral. With his election to the see of Winchester in 1238 he passes from legal history. His election was violently opposed by the king, who favoured William of Valence. In the following year he was elected to the see of Norwich. In 1242 he was again elected to Winchester; but he did not get possession of his see till 1244. He died in 1250. He was perhaps the ablest lawyer of his day—ready to improve and yet intensely national. He had much to do with passing the Statute of Merton. He defended the refusal of the barons to change the law of England as to bastardy and legitimation.[6] He is credited with the authorship of the clause relating to approvement of common, and with the invention of the writ to enforce that clause.[7] He is said also to have been the inventor of the writ of Quare ejecit infra terminum, of cosinage, and of several others.[8] In an age of great lawyers he stands out pre-eminent.

It is from Bracton that we get almost all our knowledge of this critical period in the history of our law. I shall deal firstly with his life, and secondly with his works. Finally I shall attempt to give some account of the state of the law as it appears in his works.

[1] Bracton's Note Book i 45.

[2] Royal Letters (R.S.) i no. 342, "Dictus enim dominus Martinus fortis est et in labore suo ita sedulus et assuetus quod omnes socios suos et maxime Dominum Willelmum Ralege et me labore tediosissimo jam reddidit affectos. Nec mirum, quia incipit in ortu solis quotidie laborare nec cessat usque ad noctem."

[3] Foss, Judges ii 440.

[4] Bracton's Note Book i 46, 47; Dict. Nat. Biog.; Foss, Judges ii 448-450.

[5] Below 232. [6] P. and M. i 165. [7] Bracton f. 227b.

[8] Ibid f. 438b; P. and M. i 175; H.L.R. iii 175, 176; Bracton's Note Book case 1215.

The Life of Bracton.[1]

There are no striking facts in the life of Bracton. He lived the life of a busy judge at a time when judges still did much of the work which is now done by many other departments of the civil service. When he was not thus actively employed his life was that of a student. As is usual in such cases, it is of little interest compared with his works. His name was not Bracton, but Bratton, or perhaps Bretton. Entries of his name on various rolls make this clear. But for the lawyer he and his works are, and always will be, simply Bracton. The place and date of his birth are quite uncertain. Probably the place was Bratton Fleming in Devonshire. He held land of the Flemings of Bratton Fleming, and was probably a native of their manor. He also held land at Degembris in St. Newlyn, Cornwall.[2] It may have been due to the associations and friends of his family that he took to the law. In 1212 William Raleigh was rector of Bratton Fleming, while Odo de Bratton was the vicar.[3] In 1221 William Raleigh was Martin of Pateshull's clerk. "It is by no means impossible," says Maitland, "that Martin Pateshull was clerk to Simon Pateshull, that William Raleigh was Martin's clerk, that Bracton was Raleigh's clerk, and thus inherited the rolls that he used."[4] Much of Bracton's active judicial life was associated with Devonshire. Like most of the judges of his day he was an ecclesiastic. He was instituted rector of Combe in Teignhead in 1259, and of Bideford in 1261; and the latter living he probably retained till his death.[5] He was archdeacon of Barnstaple in 1264.[6] When he died in 1268 he held prebends at Exeter and Bosham,[7] and was chancellor of Exeter Cathedral.

It is said that he studied or lectured on Roman Law at Oxford. There is no real evidence for this story. Bracton probably learnt his law as one of the royal clerks. Perhaps in his youth he learnt some rudiments of Roman law at the cathedral school of Exeter under the tuition of Thomas of Marlborough.[8] We have seen that these cathedral schools were of some impor-

[1] Bracton's Note Book i 13-25; Bracton and Azo (S.S.) x-xiii; Dict. Nat. Biog.; Round, E.H.R. xxxi 586 seqq.; note that Round has pointed out, ibid at pp. 595-596, that many of Maitland's references to the Patent Rolls in his edition of Bracton's Note Book are erroneous.

[2] E.H.R. xxxi 586-590; the Cornish land belonged to the family of Beaupré; it was granted to him by Raleigh who held it in right of his wife.

[3] However, Round thinks that "possibly too much has been made of this evidence, . . . for Odo de Bratton continued to be perpetual vicar of the church, so that Raleigh, I presume, was possibly non-resident," E.H.R. xxxi 588.

[4] P. and M. i 184 n. 4. It is probable, but not certain, that Simon Pateshull was Martin's father, ibid 148.

[5] E.H.R. xxxi 590.

[6] Bracton's Note Book i 17.

[7] Ibid.

[8] Bracton and Azo (S.S.) xx-xxiii.

tance in the days before the universities had monopolized the higher education of the country.[1] Bracton's works show that he had read the Code (at any rate the first nine books), the Institutes, the Digestum Vetus, and the Digestum Novum; the Decretum and perhaps the Decretals; Tancred's Summa de Matrimonio; Bernard of Pavia's Summa Decretalium. It is clear that he had carefully studied two works of Azo—the Summa of the Code and the Summa of the Institutes. In going to Azo for his law Bracton was going to the best authority of his day. Thomas of Marlborough, who heard him lecture at Bologna in 1205, calls him the "master of all the masters of the law."[2] Of those branches of the civil law which bore upon his practical work in the royal courts, and of those branches of the canon law which concerned him as a royal judge, he had a very thorough practical knowledge. We shall see that upon other branches of the civil law, which did not touch his practical work so nearly, his knowledge was less thorough. Perhaps this theoretical knowledge was acquired later in life, and possibly for the purpose of his treatise upon the laws of England.[3]

The first piece of definite information which we get about Bracton is the fact that he was justice in eyre in 1245. In the same year we find a papal dispensation allowing him to hold three benefices. The king, we have seen, made use of the revenues of the church to eke out the deficiencies of his civil list. In 1246 he was justice in eyre for Yorkshire, Northumberland, Westmoreland, Cumberland, and Lancaster.[4] From the year 1248 till his death he was judge of assize for the south-western counties. He does not appear to have ever been a judge of the Common Bench. From 1248 till about 1257 he heard pleas before the king himself; and in 1253 he was granted £50 a year for his support in the king's service.[5] We frequently see his signature among names known to history as a witness to charters and the like. It was during these years of political favour that he was allowed to keep the plea rolls of Raleigh and Pateshull, of which, as we shall see, he made so great a use. He ceased to form part of the king's immediate circle in 1257; and in 1258 he was ordered to restore the plea rolls upon which he had been working.[6] Perhaps his sympathies were with the baronial party. In 1259 he was among seven named persons to whom alone special commissions of assize were for the future to be granted.[7] In the same year he was sent by the baronial party

[1] Vol. i 165; above 148.
[2] Bracton and Azo (S.S.) ix, x, xxiv, xxv.
[3] Ibid xviii, xix.
[4] E.H.R. xxxi 596.
[5] Ibid.
[6] Bracton and Azo (S.S.) xii.
[7] Bracton's Note Book i 20.

upon a special eyre to collect information as to the grievances requiring redress. But, whatever his political sympathies, his judicial abilities were recognized by both sides. Whichever party was in power he still took the assizes for the south-western counties.[1] This, however, seems to have been his only regular official employment during the years 1259 to 1267. In 1264 he was commissioned to try, with the help of a mixed jury drawn from Dorset and Devon, a case of fighting at sea between the men of Lyme and Dartmouth;[2] and in the same year he became chancellor of Exeter Cathedral. In 1267 he was one of the commission appointed to adjudicate upon the claims of the "disinherited" supporters of Simon de Montfort.[3] Between the December of that year and September, 1268, he died. He was buried in the nave of Exeter Cathedral. The manor of Thorverton was charged with £6 yearly for the maintenance of two chaplains to celebrate masses for the repose of his soul.[4]

The Works of Bracton.

The works of Bracton make this period in the history of English law the period of Bracton. The action of the royal courts, though they were as yet but young, though their final form was not as yet fixed, had made it clear that England was to have a native common law. Bracton set out to write a treatise upon that law which had no competitor either in literary style or in completeness of treatment till Blackstone composed his commentaries five centuries later;[5] and as the foundation of that treatise he compiled a Note Book in which he collected 2000 cases from the rolls. Bracton's work, coming at the end of a period of rapid growth, summed up and handed on its results to future generations of lawyers. We may be tempted to compare his treatise, summing up as it did the work of his predecessors, to the great gloss of Accursius, which summed up the results of the school of the glossators. But the comparison would be superficial. Accursius was commenting upon a body of law which was comparatively fixed and stereotyped; and his work was, to a large extent, only accessory to the text upon which he was commenting. Bracton was not only writing a commentary upon a young and growing system: he was helping to create that system.

[1] Bracton's Note Book 24, 25.
[2] Marsden, Law and Custom of the Sea (Navy Records Soc.) i 7, 8.
[3] Bracton's Note Book i 22.
[4] R. P. i 3 no. 10; see ibid 7 no. 31 for a claim to dower out of the manor.
[5] Bracton's Note Book i 7, 8; Campbell, Lives of the Chief Justices ii 62, says that he "was rivalled by no juridicial writer till Blackstone arose five centuries later."

The Note Book.

The Note Book is a collection of cases made by a lawyer of the thirteenth century. The cases are taken from the rolls of the Common Bench, from the rolls of pleas heard before the king himself, and from certain Eyre rolls. They come from the first twenty-four years of Henry III.'s reign. In 1884 Sir Paul Vinogradoff suggested that this collection of cases was none other than a Note Book made by Bracton and used by him in the compilation of his treatise.[1] Maitland, who has printed and edited the Note Book, may be said to have proved that this conjecture is true.[2]

The Note Book is made up of twenty-four quires of parchment, each quire consisting of a varying number of leaves.[3] A writer of the fifteenth century knew the book as consisting of twenty-four quires, so that, if any part of it has been lost, the loss took place at an early date. The handwriting is of the thirteenth century, but several hands were employed to make the transcripts from the rolls. The person for whom these transcripts were made has himself annotated them with his own hand. There are occasionally other notes in another hand—probably that of one of the transcribers. The rolls themselves from which these transcripts have been taken still bear the marks of the person for whom they were made. The cases to be copied have been scored, and sometimes there are short notes and directions placed against them. "Very rarely indeed," says Maitland,[4] "did I find any case in the Note Book which had not been scored; so rarely that it seemed fair to attribute the fact to mere inadvertence or accident." This being the case, Maitland thinks that these scored rolls can fairly be used to supply the defects in

[1] The *Athenæum* July 19, 1884. The article is printed by Maitland in his edition of Bracton's Note Book i xvii-xxiii.

[2] The reasons adduced by Maitland, and to be found at large in the first volume of his edition, are briefly the following: (1) The rolls from which transcripts have been made are the rolls from which Bracton usually cites in the treatise; and both the compiler of the Note Book and Bracton show a preference for the decisions of Pateshull and Raleigh. (2) About every tenth case in the Note Book is cited in the treatise. This proportion is the more striking when we remember that so far as we know Bracton is the only writer of that date who cites cases—though as to this reason it is fair to remember, as Mr. Woodbine points out in his edition of Bracton i 368, that some of these cases may have been inserted by later writers who had access to the Note Book. (3) The compiler of the Note Book has annotated some of the cases. Some of these notes closely resemble passages in the treatise, e.g. the discussions as to leap year and as to the dual seisin of the freeholder and the termor. (4) Some notes seem to refer to cases not in the Note Book; these cases all refer to matters, persons, and places of which Bracton must have had local and personal knowledge. (5) Both the compiler of the Note Book and Bracton make a similar mistake as to the relation between the ordinance of 1234 relating to special bastardy, and the discussion of the subject at the Parliament of Merton in 1235-1236; as to this last point see above 221 n. 1 and L.Q.R. xxvi 153-154.

[3] The total number of leaves is 287.

[4] Bracton's Note Book i 67.

the MS. In this way two lost leaves of the first quire have been restored; and a search through later rolls has made it probable that the book once contained some extracts from two other rolls.[1]

The Treatise on the Laws of England.

Bracton intended to write a complete treatise on the laws of England. His book as we have it is unfinished. It leaves off in the middle of the discussion of the writ of right. There are several passages which contain references forward to parts of the treatise which were apparently never written. Some of these omitted topics dealt with important subjects which had found a place in Glanvil's short treatise. Such, for instance, were the actions to recover a villein,[2] the action of debt,[3] the finalis concordia.[4] The fact that Bracton's epitomizers generally give us just what we get in Bracton, and no more, is evidence to show that the missing part is not lost, but that it was never written. Again, there are passages which are directly contradictory.[5] These would certainly not have stood had the book been completed and revised. "A study of the *De Legibus*," says Mr. Woodbine, "brings with it the conviction that Bracton spent a considerable time in the work of revision without being able to finish his book. There is every indication that an original first draft, fairly complete, and itself in no way a meagre piece of work, was gradually expanded and filled out in places. For a number of years, some ten or twelve, perhaps, or even more, the author kept adding a mass of after thoughts, or additions, to what he had already written. That this revision left him no time to carry out all that the very comprehensive early plan called for is suggested by the general air of incompleteness in the last part of the book. We are forced to believe that the work grew larger, not smaller, as Bracton worked over it, and the copy which he left, when he died in 1268 was very different from the original draft from which that copy had grown."[6]

The best evidence as to the date at which the treatise was composed is to be found in the cases cited therein. Nine-tenths of these cases come from the years 1216-1240. It would be a plausible conjecture to suppose that the remainder were added by another hand. But Maitland thinks that most of them formed part of the original text.[7] The two latest cases, which come

[1] The Eyre roll of 1221 for the county of Worcester held by Pateshull and the abbot of Reading, and the Eyre roll of 1219 for the county of Lincoln, also held by Pateshull.

[2] f. 7. [3] f. 60. [4] f. 33b.

[5] Bracton's Note Book i 36, 37; ff. 18b, 49, 412b.

[6] Woodbine, Bracton De Legibus i 302; for Mr. Woodbine's edition see below 237 n. 5.

[7] Bracton's Note Book i 37, 38.

from the years 1258 and 1262, may have been added to the text; but there is nothing to show that the person who added them was not Bracton himself.[1] Apart from the evidence to be drawn from the cases, there is other evidence that Bracton was not actively engaged upon his book up to the time of his death in 1268. He does not mention, and even states law inconsistent with, the Provisions of Westminster, 1259. We cannot explain this by supposing that it was due to political bias, seeing that some of these Provisions made alterations in the law which he had advocated.[2] He does not mention the statute as to leap year (1256), though he was present at the making of it, and though he had views of his own upon the matter which were overruled by the statute.[3] It is probable, therefore, that, though he may have added an occasional note or case, he did not seriously work at his book after 1256.[4]

There are many MSS. extant of Bracton's book, and there are many differences between them; but, until the publication in 1915 of Mr. George E. Woodbine's first volume of his edition of Bracton,[5] they had been neither catalogued nor systematically studied. Mr. Woodbine tells us that, "including those which are fragmentary, abridged, or incomplete, there are forty-six manuscripts accessible to scholars, with two, possibly three, others in existence which are not accessible;"[6] and that all of them were produced at some date before 1400.[7] "We may doubt," says Maitland,[8] "whether any book written by a mediæval Englishman that was so bulky as Bracton's, and was not a book of devotion or theology was more popular, or more often transcribed." And the book was not only transcribed, it was also summarized. Epitomes of all kinds were made. Gilbert de Thornton, chief justice of the King's Bench (1289-1295) made one;[9] and we shall see that Hengham, who held the same position

[1] Bracton's Note Book i 38; the evidence in favour of this view is strongest in the case of the later decision.

[2] Ibid 41, 42.

[3] Ibid 42, 43.

[4] Woodbine seems to agree with this conclusion of Maitland's, op. cit. i 364-365.

[5] Bracton, De Legibus et Consuetudinibus Angliæ, edited by George E. Woodbine, vol. i; this volume "represents the work which had to be done to clear the way for a new text of the *De Legibus;*" the Latin text with variant readings and commentary will appear in vols. ii and iii, and the translation in vols. iv and v; the sixth vol. will contain the introduction.

[6] Op. cit. i 1; see pp. 1-20 for an account of those MSS.

[7] Ibid i 27.

[8] Bracton and Azo (S.S.) xxxi-xxxiii.

[9] Mr. Woodbine has proved, L.Q.R. xxv 45-52, that a copy of his Summa is contained in Hale MS. 135 in Lincoln's Inn Library. It agrees closely with Selden's description, in his Dissertation on Fleta, of a MS. of Thornton's Summa; it contains a reference to a case of 11 or 12 Ed. I. which concerned a place and persons well known to Thornton; and on the fly leaves there are memoranda relating to Alan de Thornton, who was certainly of the same family, and probably the son of Gilbert.

(1273-1289), summarized part of it in his Magna.[1] Another part of it was copied in the tract called *Cadit Assisa*.[2] We shall see also that Britton and Fleta, the two leading text-books of Edward I.'s reign, are little more than epitomes of Bracton brought up to date.[3] Both of them end where Bracton's unfinished Treatise ends. This evidence proves that the Treatise became at once the leading text-book of the law of England.

The position thus taken by the Treatise goes far to explain not only the number but also the bewildering diversity in the contents of the many MSS. which have come down to us. And this diversity in contents is increased by the fact that no one of these MSS. is "nearer than the third generation to the original, at the nearest; the majority fall in generations much further on."[4] Hence there is no sort of agreement between large groups of MSS. either as to the manner in which the Treatise as a whole ought to be divided, or as to the order in which the subjects dealt with in the Treatise are discussed, or as to its contents. (i) In the printed edition, the Treatise as a whole is divided into five books; but this is not the arrangement of a large number of the MSS.; and, even if a division into books is adopted, these books all disagree in the manner in which the subject matter is distributed between them.[5] In fact "there are some forty codices with almost half as many different schemes of division."[6] (ii) As to the order in which the subjects are presented there is also great diversity.[7] In the larger number of cases, it is true, the order is that followed by the printed texts; but in many MSS. many parts of the text are omitted or transposed. (iii) In the MSS. there are very numerous "addiciones."[8] Some of them have, in some MSS., found their way into the text, while in other MSS. they are in the margin; or at the foot of the page. Occasionally they are written on separate slips of parchment and bound up with the text at the appropriate point.[9] Some of these addiciones cannot be by Bracton, as they refer to cases decided, statutes enacted, and events occurring after his death. Others may well be from the pen of Bracton himself. Others were probably made

[1] For Hengham see below 318-319; for his Summa see below 323-324.
[2] Woodbine, op. cit. i 23; below 322.
[3] Below 319-322.
[4] Woodbine, op. cit. i 24; and, as Mr. Woodbine points out, the situation is further complicated by the fact that, "there is hardly a manuscript whose immediate ancestry has not disappeared. Numerous gaps in every line . . . prove that the half a hundred copies now existing are only part of the number actually written. These gaps in the line of descent have more than overbalanced the advantage of a not too large number of manuscripts."
[5] Op. cit. i 28 seqq. [6] Ibid 41. [7] Ibid 64 seqq.
[8] For an exhaustive account of this important topic see ibid 91-94, 312-422; some of them are merely rubrics which have got into the text, ibid 315 seqq.
[9] Op. cit. i 326-329.

by the owner or owners of the MSS. But it is often quite impossible to determine whether or not any particular addicio was written by Bracton.[1]

The reasons for this diversity in the MSS. is not far to seek. In the first place there is reason to think that Bracton himself from time to time revised and added to his book; and he may at intervals have rewritten a part of it.[2] Now if Bracton, had, while working at his book, allowed some one to copy it, or if "an original draft had been used as an example after Bracton's death," in either case the copy would have been different from the MSS. which Bracton left at his death.[3] It is very likely, Mr. Woodbine thinks, that some of the outstanding differences between the groups, in which the MSS. can be divided, can be explained in this way. In the second place, it is quite clear that many of the MSS. were made in some scriptorium by many hands working simultaneously;[4] and that these hands were not always working from the same copy.[5] Sometimes a text may have been made by scribes working in different places, who must necessarily have used different copies.[6] "This practice of copying and recopying from more than one exemplar began early and lasted late, and has produced a complicated network of lines of descent which it is almost impossible to straighten out."[7] In the third place it is quite clear that the owners of the MSS. have inserted additions—sometimes from other MSS. of Bracton, sometimes from their own reading or experience. The fact that the book was valued and used as a book of practice ensured its being noted up so as to include the fullest and most recent information that could be got, for thereby its value to the practitioner was greatly enhanced.[8]

This enormous mass of diversified material has at length been analysed with patience and skill in Mr. Woodbine's first volume. He concludes that no one of the MSS. has pre-eminent authority, and, as we have seen, that no one can be said to represent Bracton's autograph. In particular he has quite conclusively demonstrated that the Digby MS. in the Bodleian Library, has not, as Maitland supposed, any claims to represent it.[9] But he has shown that the MSS. can be divided into three main groups. The first of these groups has the fewest additions, and may be

[1] Op. cit. i 321-322. [2] Above 236. [3] Op. cit. i 302.

[4] This for instance was the way in which the Digby MS. in the Bodleian Library was composed, Maitland, Bracton and Azo (S.S.) 240.

[5] "We have abundant proof from the MSS. themselves that some of the scribes worked with at least two models at hand," Woodbine, op. cit. i 91; see also ibid 24-26.

[6] Ibid i 26. [7] Ibid.

[8] Above 237-238; Woodbine i op. cit. i 82-84.

[9] Op. cit. i 68-91, 339-342.

ultimately derived from a MS. incompletely revised by Bracton; the third has more additions, and probably came from a text which Bracton had completely revised; and the second, which is nearer to the third than the first, has most additions, as it too probably springs ultimately from a completely revised text.[1] But it should be noted that, in many cases, one MS. or its descendants will represent in different parts more than one group.[2] Mr. Woodbine proposes to construct a text from the best representatives of all three groups of MS. and a few others;[3] and this seems to be the only feasible plan.

He proposes to deal in a somewhat similar manner with the "addiciones." When all the additions have been discarded which cannot be by Bracton, when all have been included which are probably by him, there still remain a large doubtful class. As to these, each is to be considered separately on its merits with a bias in favour of inclusion. As Mr. Woodbine says,[4] "it is better and safer to eliminate only what is clearly not from Bracton, and to retain much as doubtful, marking it as such. By making use of this method of selection there will be no danger of repudiating anything which really belongs to the Treatise. Moreover, there will be in this way preserved many thirteenth century *addiciones* which are instructive, even if they do not come from Bracton."

When Mr. Woodbine finishes his task the reproach which has rested so long on our legal historical scholarship, that no adequate printed edition of Bracton exists, will have been removed. It is a reproach which a very cursory examination of the two printed texts of Bracton at present extant shows to be very serious. The first of these two texts is Tottell's edition of 1569, which was edited by one T.N., and reprinted in 1640. The editor of this edition claims to have used twelve MSS.; but as he only noted about forty variants in the whole work, it is clear that he used them in no critical spirit.[5] His intent was not to improve the text, but to incorporate everything that "might have any possible claim of having been written by Bracton."[6] He did not try to get rid of interpolations, and he accepts without comment even obvious "addiciones."[7] Moreover, he took no trouble to cor-

[1] Op. cit. i 186 seqq; ibid 299, 302.

[2] See e.g. ibid. i 303, 309-310. This might arise either because a MS. belonging to one group has been altered or added to by corrections from a MS. in another group, ibid 308, or because a MS. may have been copied from MSS. in different groups, ibid 310.

[3] Ibid 310. [4] Ibid 371. [5] Ibid 312. [6] Ibid 313.

[7] At the same time Mr. Woodbine thinks that he may have made some sort of comparison between his MSS.—"though the all too frequent repetition of passages shows that he did not always exercise due care, and though there are included in his text passages which are found in none, or in only a few, of the extant manuscripts, yet the absence of certain other passages—found often enough in the general run of

rect the errors of the printer. It is no wonder that Selden pronounced this edition to be full of gross errors, due partly to the ignorance of the editor, and partly to his carelessness in passing it through the press.[1] The second of these texts is that of Sir Travers Twiss who edited and translated Bracton for the Rolls Series. His text is based for the most part upon that of Tottell to the errors of whom he has added.[2]

The manner in which Bracton intended to arrange his work is very much a matter of conjecture.[3] His predecessor Glanvil, and his successors Britton and Fleta, divided their treatises into books; but we have seen that the arrangement into books, which is found in a certain number of the MSS. of Bracton, is not found in all the MSS.; and that, where it is found, it is so differently used to divide the subject matter that it is difficult to believe that Bracton himself adopted any such arrangement.[4] It would seem that Bracton himself had no very definite scheme of arrangement. We must remember that the book was unfinished and that he was working at it throughout the greater part of his life.[5] He tells us himself that he has arranged his book in certain divisions and sub-divisions, but that his mind is open as to the ideally best method of arrangement.[6] The result is very much what might be expected. There is an introductory part, much influenced by Roman law, in which the Roman division of the law into persons, things, and actions is put forward as a primary division.[7] But, as we shall see, this

manuscripts to make their discovery practically certain by any one who might be looking for such material—suggests at least the probability of his having made some sort of comparison and selection," ibid 313.

[1] "In editionibus illis utrisque menda sunt per plurima eaque crassissima, partim e librariorum inscitia, partim ex operarum incuria," Diss. ad Fletam c. 3 § 1.

[2] L.Q.R. i 189-200, 425-429, 441-442. The quality of the translation is well illustrated by the fact that "actio negotiorum gestorum" is rendered "action on the case."

[3] On this subject see Woodbine, op. cit. i 45 seqq.; at pp. 60-62 will be found in tabular form the kind of arrangement which the treatise had ultimately assumed.

[4] "There is no evidence to show either that Bracton divided his treatise into books or that he intended so to divide it," ibid 43; "It was usual and customary that a long work like his should have divisions of this kind (i.e. into books); we should expect to find them. But if Bracton ever formulated a plan of this sort all external evidences of it have disappeared," ibid 45.

[5] Above 236.

[6] "Ad instructionem saltem minorum, ego (Henricus de Brattone), animum erexi ad vetera judicia justorum perscrutanda diligenter non sine vigiliis et labore; facta ipsorum, consilia et responsa, et quicquid inde notatu dignum inveni in unam summam redigendo sub ordine titulorum et paragraphorum, sine præjudicio melioris sententiæ, compilavi," f. 1a, cited Woodbine op. cit. 45 n. 3; for a discussion of the meaning of the passage see ibid 46-59; as Mr. Woodbine very truly says at p. 50, "he was more interested in his text than in the arbitrary divisions of that text."

[7] "Quia omne jus de quo tractare proposuimus pertinet vel ad personas, vel ad res, vel ad actiones, secundum leges et consuetudines Anglicanas, et cum digniores sint personæ, quarum causa statuta sunt omnia jura, ideo de personis primo videamus," f. 4b.

introductory part is a very small part of the Treatise.[1] Bracton meant to treat of English law; and the English law of his day could not very conveniently be grouped under those heads. He was therefore driven by the nature of his material to adopt what is really a different arrangement. The main body of the Treatise is divided into different tracts dealing with the most important of those actions, criminal and civil, which formed the staple of the business of the king's courts. Superficially, it is true, these tracts can be squared with the Roman divisions into persons, things, and actions, since all of them could be grouped under the law of actions; but only superficially, since the main body of the Treatise consists of these separate tracts which, as Bracton says, are simply divided "sub ordine titulorum et paragraphorum."[2] This we shall see more clearly if we look at the various topics with which the Treatise deals, and at the space allotted to each of them.

The first seven folios contain the introductory part and the law of persons. The law of things begins with folio 7b. The various divisions between things, taken for the most part, as we shall see, from Roman law, are described; but the largest section of it (folios 11-98b) is concerned with the law of *donationes* or feoffments. The law of actions begins at folio 98b. From folios 98b-106 the generalities of the law of actions and obligations are described. At folio 106b there is a transition to the subject of the various kinds of jurisdiction exercised within the kingdom; and the last part of this section (folio 112) describes certain rules of procedure in an action. At folio 115 begins the description of the pleas of the crown. From folio 159-237 an account of the assize of Novel Disseisin is given; from folio 237b-252 an account of the assize of Darrein Presentment; from folio 252-285 an account of the assize of Mort d'Ancestor; from folio 285-296 an account of the assize Utrum, to which is added an account of the attaint jury; from folio 296-317b an account of the action of Dower; from folio 317b-327b an account of the writs of Entry; from folio 327b to the end an account of the writ of Right, which is incomplete. In dealing with the writ of Right the following topics are discussed: The forms of the writ,

[1] Below 267-268.

[2] "Bracton's *titulus* is to represent some broad, leading subject; his *paragraphus*, one of the larger single divisions of text treating of a sub-topic of the title. This is his plan in general. Different subjects will require different treatment in detail, titles will vary in importance, paragraphs will be long or short, the purely English law with its forms of writ and references to cases will present a different appearance from the quotations of Azo, absolute uniformity it will be impossible to attain; but to the very end of his book we shall find him following this method of choosing a main subject and discussing it under the heads into which it naturally falls," Woodbine, op. cit. i 48.

jurisdiction, procedure, and summons (327b-334); essoins (334-364); defaults (364b-380); warranty (380b-399); and exceptions (399b-444).

English law as portrayed by Bracton.

Both in the arrangement of Bracton's Treatise and in the manner in which he deals with his material we can see two of the permanent characteristics of English law: (i) We have seen that in Glanvil's Treatise the most important part of the law is the procedure and practice of the court.[1] We see there one of the permanent traits of English law—its dependence upon writs. In Bracton's Treatise we see the same trait much emphasized. The number of writs has grown. The register of writs is almost as large as it will be in Edward I.'s reign;[2] and the most practical parts, the largest parts, of the Treatise are discourses upon various important writs and actions. The treatment is that which we might expect from a man who has for many years been engaged in the practical work of trying cases. The atmosphere is that of a court where a case is proceeding. What points can be made against the writ? What against the action? What against the plaintiff? How can these points be met? What precautions should the judge take to get at the merits, to bring out the truth? It is a method of treatment which involves repetition; but it is a method well suited to the needs of those who were administering a young and growing system of law. (ii) In the Treatise we can see also another of the permanent characteristics of English law—its dependence upon decided cases. The law, says Bracton, should go from precedent to precedent;[3] and it is clear that this will still further strengthen the dependence of substantive law upon the law of procedure.[4] Wherever it is possible Bracton vouches a case, or comments on a case which does not commend itself to him. There are as yet no reports. The cases are taken from the rolls. But, though cases are cited in the tracts which come from the end of the century,[5]

[1] Above 190-192.

[2] Below 512-525 for the history of the register.

[3] f. 1b, "Si similia evenerint, per simile judicentur, cum bona sit occasio a similibus procedere ad similia." Cp. Bracton's Note Book, case 409 note—a rare case where the roll cites a precedent.

[4] f. 1b, "Et sciendum est quod materia [legis] est facta et casus, qui quotidie emergunt et eveniunt in regno Angliæ, ut sciatur quæ competat actio, et quod breve, secundum quod placitum fuerit reale vel personale; et super hiis acta conficienda sive irrotulationes secundum proposita et objecta, agendo et probando, defendendo et excipiendo, et replicando, et hujusmodi."

[5] Woodbine, op. cit. i 366-367.

in his constant and particular citation of authorities Bracton is in advance of his age.[1]

There is, however, one characteristic of Bracton's work which was not destined to be permanent. This is his citations from and his reliance upon Roman law. Nobody who reads Bracton can deny that there is a Roman element in his work. We shall see that opinions differ widely as to its extent.[2] In the following period English law was administered by men who for the most part knew little of any system but their own. Bracton's references to Roman sources were omitted or misunderstood. Looking at Bracton's book by the light of subsequent years, we are perhaps apt to underestimate a characteristic which has not been permanent, to overestimate those characteristics which have been permanent. If the judges who succeeded Bracton had possessed Bracton's knowledge of Roman law, more attention would have been paid, and justly paid, to the Roman parts of Bracton's Treatise, because they would have had more influence upon the history of English law. The great historical interest of the Treatise really is this—that it comes at the parting of the ways. It gives us a picture of English law as developed by judges who were not merely lawyers and not merely common lawyers.

Taking Bracton's works as my guide I shall attempt to give some account of the English law of this period, and to estimate the influence which his works have had upon the future development of that law. I shall deal firstly with Bracton and English law, secondly with Bracton and Roman law, and thirdly with the influence of Bracton upon the history of English law.

Bracton and English Law

Adjective Law.

That an early stage in the history of law is marked by the greater relative importance of adjective law; and that, consequently, this department of the law is the first to become systematized, is a commonplace of legal history. This relative importance of adjective law is clearly marked in these early years of the history of English law; and therefore it is largely the qualities of its adjective law that determine its leading characteristics, and explain its rapid progress during this period.

[1] P. and M. i 162. Fleta and Britton do not as a rule cite cases; the only exception is Fleta ii 3. 9, 10, 12, who cites some cases decided in the court of the steward and marshal.

[2] Below 267-270 seqq.

I shall deal with these characteristics under the following three heads: (i) Forms of Action; (ii) Forms of Relief; and (iii) Rules of Procedure.

(i) Forms of Action.

The remedies given by English law in the time of Bracton were not as yet limited by a fixed and definite register of writs.[1] There were indeed a growing number of writs of course which could not be changed without the consent of the common council of the realm—more especially if a change would infringe the statute law.[2] Much debate was occasioned by William of Raleigh's new writ of cosinage, because it was thought to infringe the provision of the Great Charter that the writ præcipe should not issue so that a man should lose his court.[3] Bracton in his Treatise argues at length that it is no infringement.[4]

Besides the two classes of original and judicial writs which, as we have seen, were known in the time of Glanvil,[5] Bracton knows a third class which he calls "magistralia." They could be freely issued to meet new cases in which it was thought expedient that an action should be granted.[6] Thus Bracton could say, "Tot erunt formulæ brevium quot sunt genera actionum." It would probably not be going too far to say that it was the power to issue these "brevia magistralia" which was the immediate and effective cause of the rapid development of the law during this period. It meant that the law could be naturally and easily developed to meet new cases; and that, therefore, it could exhibit in a high degree the qualities of flexibility and elasticity.

The two most striking illustrations of the flexibility and elasticity of the procedure of the royal courts, and their consequent capacity to administer a justice that was equitable, are to

[1] Below 512-525, for the history of the register.

[2] Bracton f. 413b, "Et sunt quædam brevia formata super certis casibus, de cursu et de communi consilio totius regni concessa et approbata, quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum."

[3] Bracton's Note Book, case 1215, "Cum contentio esset inter quosdam magnates super quoddam breve quod vocatur Præcipe, et unde quidam dicebant quod fuit manifeste contra cartam Dom. Regis de libertatibus concessis baronibus Anglie, et tandem ab omnibus approbatum et concessum est ab omnibus quod tale breve robur optineat in gradibus et personis ubi assisa mortis antecessoris certas personas non transgreditur;" for this writ see vol. iii 24, and App. Ia 9; for the clause of Magna Carta, vol. i 58, 59.

[4] f. 281.

[5] Above 193-194.

[6] f. 413b, "Sunt etiam quædam quæ dicuntur magistralia et sæpius variantur secundum varietatem casuum et querelarum, et quædam sunt personalia, quædam mixta secundum quod sunt actiones diversæ et variæ, quia tot sunt formulæ brevium quot sunt genera actionum;" cp. f. 325b, "Et hæc exempli causa sufficiant, quia infiniti sunt ingressus et formæ brevium infinitæ;" Bracton's Note Book, case 1930,

be found in the manner in which they dealt with the common case where one man held land to the use of another, and with the question of the power to devise land. When Bracton wrote, it was by no means certain that the common law would not be capable of devising a remedy to protect the interest of the person to whose *opus* or use land was held,[1] similar in its nature to the writ of detinue by which the right of a third person, to whose use money or chattels had been bailed, was protected;[2] and it is quite clear from his book that it was by no means certain that a writ to protect the devisee of land was legally impossible.[3] There are also other less striking illustrations of the fact that the king's judges were not tied so strictly to rules of substantive law or to rules of procedure that they could not do equity. Thus Bracton tells us that if A enfeoffs B to hold of him by a small service, and B enfeoffs C to hold of him by a greater service, and B's land escheats, the "rigor juris" would hold that A is entitled to both services. Equity, however, "sibi locum vindicant in hac parte;" and the lord is only entitled to the greater service.[4] Similarly where there have been several disseisins, the court can look at the facts, and not allow any technical rules of procedure to prevent the seisin remaining with the person who had been first disseised of the property.[5] If a wife brings novel disseisin, and the absence of her husband (who has perhaps gone on Crusade) is objected, she will get her seisin "per officium judicis et de consilio curiæ," though strictly speaking she has no right of action.[6]

(ii) Forms of Relief.

As it was with the forms of action, so it was with the forms of relief given by the royal courts. These courts by no means confined themselves as rigidly as they did in later days to the remedy of damages. On the contrary they gave various kinds of specific relief which, in later law, came to be associated with the equitable jurisdiction of the Chancellor. This relief they

[1] Bracton's Note Book, cases 1683, 1851; below 593-595; Bk. iv Pt. I. c. 2.

[2] Below 367, 454; vol. iii 425-426; Bk. iv Pt. I. c. 2.

[3] Vol. iii 75-76.

[4] f. 23b; and for similar instances of an appeal to equity ff. 12b, 18b, 178.

[5] f. 177, A disseises B and enfeoffs C. Then A disseises C and enfeoffs B. C brings novel disseisin against B and A. Strictly he should recover the possession, as the case of the person last disseised is heard first, and B will be left to his writ of entry. Bracton, however, thinks this inequitable, "temperandum est igitur negotium ex officio judicis, quod quicquid agatur remaneat saysina cum primo spoliato vel disseysito;" and, "semper locum habebit judicis officium, ut æquum separetur ab iniquo . . . et quod ita fieri debeat per consilium curiæ sive per judicis officium quod idem est, quod remanere debeat seysina rei disseysitæ cum vero domino et non cum feoffato per disseysitorem"—perhaps this is an early form of the principle which later developed into the doctrine of remitter, below 587.

[6] f. 203. For a relaxation of a rule of procedure as to the day of appearance, "quia tempus breve est," see Bracton's Note Book, case 785.

gave both to enforce obligations connected with property and contract, and to prevent various kinds of wrongs to property.[1]

(*a*) The enforcement of obligations connected with property and contract.

It would be misleading in this connexion to talk of "specific performance," as that term has acquired a technical meaning in connection with the equitable jurisdiction of the Chancery. And this is not merely a question of terminology, because the specific relief given at this period by the common law courts was not based upon the same principles as those upon which the Court of Chancery in later days granted specific performance. The common law courts did not start, as the Court of Chancery started, from the principle that it was just and equitable that a man should perform what he had promised;[2] for we shall see that, when Bracton wrote, they did not make a practice of enforcing promises.[3] They started rather from the basis of the real actions which, as we shall see, covered a wide field.[4] The distinguishing characteristic of the real actions was the specific character of the relief which could be obtained by their means. The plaintiff got the *res* which he claimed; and, similarly, in the many other actions which enforced the obligations of the lords or the tenants of land, relief of a real or specific kind was naturally granted. If an action was purely personal, Bracton distinctly tells us that damages and damages alone could be got;[5] but if it was a real action, or obviously connected with a real action, specific relief could always be had. The very nature of the action pre-supposed and demanded it. Thus, if a landlord broke his covenant to lease land for a term of years, the court restored possession to the lessee;[6] and similar relief could be got by the writ *Quare ejecit infra terminum.*[7] Many various arrangements relating to land could be made by a fine; and specific relief could be got if the parties did not keep their bargains. In one case the sheriff was not only ordered to deliver seisin in accordance with the terms of a fine, but also to demolish a ditch which had been erected in a place where there was a right of common.[8]

[1] On this subject see generally Hazeltine, Essays in Legal History (1913) 269-284.

[2] Bk. iv Pt. I. c. 4.

[3] Below 265; vol. iii 416.

[4] Ibid 3-26.

[5] Ibid 322.

[6] Ibid 3, 214; cp. Bracton's Note Book, case 1739—"Et ideo consideratum est quod convencio teneatur et quod Hugo habeat seisinam suam usque ad terminum suum x annorum."

[7] Vol. iii 214.

[8] Bracton's Note Book, case 1579, "Et ideo consideratum est . . . quia cognoscit finem, habeat Abbas breve ad vicecomitem quod secundum proportum cyrographi habere faciat eidem Abbati communam illam, et si fossatum levaverit infra communam illam, illud prosterni faciat ita quod pastura illa sit in eodem statu quo fuit quando concordia facta fuit inter eos;" cp. case 1386—an order to demolish two houses erected on land where there was a right of common.

In another case the party in default was ordered to fulfil his duty of warranty,[1] and in another he was forbidden to demand forinsec service.[2] The duty of a donor to warrant the title of his donee,[3] of a lord to perform the services due to his superior lord so that his tenant was not distrained by that superior lord,[4] of a lord to take the homage of a tenant,[5] of a tenant to repair,[6] are all specifically enforced. These duties were enforced sometimes by distraint,[7] sometimes by taking security,[8] and sometimes by forfeiture of the land.[9]

(*b*) The prevention of various kinds of wrongs to property.

It was only natural that the courts should make similar orders if a defendant was proved to have been guilty of specifically wrongful acts, such as nuisance or waste. Thus in one case a market,[10] and in another case a ditch[11] was ordered to be suppressed because it was a nuisance. A guardian was ordered to replace two houses which had been removed, and to find pledges that he would both replace these houses and that he would commit no further waste.[12] But in the case of waste the court possessed another weapon in the writ of prohibition,[13] which at this period, was so developed that it did work analogous to that done both by the perpetual and the interlocutory injunction of our modern law. Thus the dowress,[14] the guardian,[15] and the lessee for life[16] or years,[17] could be prohibited from committing waste; and if, as in the case of the dowress, the commission of waste did not entail the forfeiture of the property, the heir could be given the power to appoint a person to see that no further waste was committed.[18] Further the writ of estrepment could be brought to prevent the commission of waste after judg-

[1] Bracton's Note Book, case 1652.
[2] Ibid, case 361.
[3] Ibid, case 594.
[4] Ibid, case 390.
[5] Ibid, case 838.
[6] Ibid, case 1165.
[7] Ibid, case 1081.
[8] Ibid, cases 1075, 1165.
[9] Ibid, case 540, "Dictum est ei quod de cetero sub pena amissionis predictae terrae non faciat vastam vel destruccionem;" see generally Hazeltine, op. cit. 269.
[10] Bracton's Note Book, case 1162, "Consideratum est quod mercatum de Melefordia prosternatur et Abbas in misericordia."
[11] Ibid, case 1253.
[12] Ibid, case 1075, "Et ideo pro parvitate vasti et modo vastandi consideratum est quod Godefridus faciat alias duas domos ad valenciam predictarum domorum et sit in misericordia. Et invenit tales plegios quod amplias non faciat vastum nec arbores asportabit et quod faciat domos sicut predictum est."
[13] Hazeltine, op. cit. 270-284; see vol. iii 121-122.
[14] Bracton's Note Book, cases 461, 527, 540; Bracton, ff. 315, 316.
[15] Bracton's Note Book, cases 388, 443, 1075, 1165.
[16] Ibid, case 607.
[17] Ibid, case 540.
[18] Ibid, case 56, "Consideratum est quod Albertus habeat forestarium suum et ipsi Hamon et Matillis nichil capiant nisi per visum forestarii ipsius Alberti scilicet, haibote et usbote, et sint in misericordia quia contra prohibicionem etc vastum inde fecerunt;" cp. Hazeltine, op. cit. 272.

ment in a real action;[1] and, as extended by the statute of Gloucester, to prevent its commission pending the proceedings in such an action.[2] No doubt these writs of prohibition were as often as not addressed to the sheriff, because he was the executive officer of the court.[3] But they could also be addressed to the parties, and, in such cases, it is clear that they present an analogy to the equitable injunction.[4]

But here too the analogy with the later equitable injunction is only an analogy. In these cases, as in the other cases where specific relief was granted, it was based, not upon the personal ground that the defendant's conduct was inequitable, but upon the general ground that a wrong was committed if the particular interest in land were used in such a way. Just as the law gave specific relief if the lord ejected his tenant, so the same relief was granted if the tenant used his land in a manner inconsistent with the nature of the interest granted. No doubt these rules might have been developed into a body of law not unlike that created in later days by the court of Chancery. But, as we shall see, they never did so develop. Even if they had so developed they would not have been based upon quite the same principles as the later equitable rules. But, of the difference between the equity administered in the common law courts and the equity administered in later days by the chancellor, I shall speak more at length in the next chapter.

(iii) Rules of Procedure.

Just as the relief given by the common law courts might be specific, and therefore varied to suit the nature of the case; so, in the conduct of a case, the court was not prevented by strict procedural rules from adopting any methods which seemed to it to be the most likely to elicit the truth. In fact, rules of procedure were made as elastic as was consistent with a due regard to the proper conduct of a case and its proper presentment to the court. So far as was possible the judges tried to prevent them from working injustice. Thus we have seen that at this period many different degrees of guilt and consequent modifications of punishment were recognized in the case of jurors who had

[1] Hazeltine, op. cit. 275.

[2] 6 Edward I. c. 13; vol. ii 121.

[3] Hazeltine, op. cit. 283.

[4] Bracton's Note Book affords many instances of both varieties; cp. F. N. B. 60 V, "When a man hath a real action depending, as a *Formedon*, or a *Dum fuit infra aetatem* or a writ of right, or such action wherein the demandant shall not recover damages; then he may sue this writ of Estrepment against the tenant, inhibiting him that he do not make waste or strip;" ibid 61 A, "And in every real action the demandant may have a writ unto the sheriff, commanding him that he see that the statute which ordaineth the estrepment be observed; and that he do not suffer the tenant to do such strip: and by the like reason he may have the writ against the tenant,"

given a wrong verdict.[1] Third parties were allowed to intervene in the proceedings, and even to make good their claim to the property which was the subject of the action.[2] The court asked questions of the parties, and in this way sometimes extracted admissions which concluded the case.[3] Bracton says that it is the court's duty so to do.[4] It examined the secta of the parties in order to arrive at the truth.[5] The judicial mind was distinguished for its intelligence rather than its ignorance. It will note that the wax of a seal purporting to be eight years old looks quite fresh,[6] and that a writ is not written in the proper Chancery hand.[7]

We must not, however, suppose that the royal court attempted to attain abstract justice at the expense of their rules of procedure and pleading. No workable legal system can be formed unless there is a strict adherence to rules and forms, even at the cost of injustice in individual cases.[8] Litigants who sued by the wrong form of action were in mercy for a false claim and must purchase another writ.[9] If a plaintiff had several alternative forms of action he must take them in their proper order;[10] and the same rule applied to the various steps to be taken in an action.[11] The plaintiff who tried to sue again by the same form of action on the same facts was met by the plea of *res judicata*.[12] The plaintiff whose statement of claim (*narratio*) departed in even the smallest degree from his writ at once lost his action.[13] In all classes of proceedings, and especially in the appeal of felony,[14] a strict and literal accuracy was required in

[1] Vol. i 338, 339.

[2] Bracton's Note Book, cases 5 and 688. In case 525 a third party intervenes in a suit concerning a rent and proves it to be his own partly on the strength of a former judgment in his favour.

[3] Ibid case 303 and note.

[4] f. 183b, "Officium autem (justiciarii) est diligenter causam examinare, et non solum diligenter, imo diligentissime, secundum illud beati Job, qui dixit, Causam quam ignorabam diligentissime examinabam. Interrogare enim debet partes, tam actoris quam rei."

[5] f. 159, "Et cum hinc inde fuerunt secta diligenter examinata, per ea judicabitur quæ probabilior et verisimilior esse probabitur;" Bracton's Note Book, cases 1115, 1693; for the secta see vol. i 300, 301.

[6] Ibid case 187.

[7] Ibid case 1847.

[8] Maine, Ancient Law 75.

[9] Bracton's Note Book, case 392.

[10] Bracton f. 112b, 113—thus you may go from an assize of novel disseisin to a writ of entry, and thence to a writ of right; but you cannot reverse the process, cp. Y.B. 19 Ed. III. (R.S.) 66-74; for these actions see vol. iii 5-14.

[11] Bracton's Note Book, case 1776.

[12] Bracton f. 272.

[13] Bracton's Note Book, cases 86, 152; the note to the latter case is as follows: "Nota in causa prohibitionis quod cadit loquela eo quod querens recedit de brevi suo, scilicet ubi breve loquitur de debito et querens in loquela sua loquitur de catallis;" this is something like the departure in pleading of later law, vol. iii 634.

[14] Bracton f. 141; above 198.

the pleadings. A mistake in a name, or syllable, or letter was fatal.[1] Thus, a pleader who made the obvious mistake of describing Henry I. as the grandfather of King John was amerced; and the action would have been lost if the mistake had not been promptly disavowed by his principal.[2]

One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves. In the time of Bracton the older rigid rules of pleading were being extensively modified by the introduction, under the influence of the Roman law, of various defences (*exceptiones*) which were allowed to be pleaded.[3] The new rules were giving elasticity to common law rules of pleading; and they had not yet developed, as they did in later days, into a science so exact that it often overrode the claims of substantial justice. The conduct of the court is often far more like that which we expect in quite modern times than that which we see in the fifteenth or even in the early nineteenth century.[4]

Bracton's eloquent exhortations to the king and to his brother judges to do justice and equity are not merely pieces of fine writing. He was impressed by the majesty of the law and the responsibility of the judge. The definitions of "law," "justice," and "equity," which he got from the great Roman jurists, he took as seriously as they were taken by those who originally framed them. Unless the law had been administered by men of this temperament we may well doubt whether the royal courts would have won so complete a victory over their many rivals.[5] The many varied and extensive franchise jurisdictions, the feudal courts, the communal courts, were all competitors for the business of administering justice. The ecclesiastical courts were ever ready to encroach;[6] and many of their subterfuges to evade the writ of prohibition were very

[1] Bracton f. 188b, "Ut si quis erraverit sic nominando Henricum de Bracthon ubi nominare debet Henricum de Bracton;" cp. f. 211.

[2] Bracton's Note Book, case 298.

[3] Below 554; vol. iii 630.

[4] Vol. i 301, 645, 646.

[5] Ibid 187-188.

[6] See L.Q.R. vii 64 no. 38—forms for an action in the ecclesiastical courts for the breach of a contract to copy a book,

ingenious.[1] If the procedure of any of these rival courts, if the quality of the law administered by them, had been markedly superior to that of the royal courts, we may doubt whether the latter would have succeeded in attracting the largest share of the legal business of the country.[2] In France the ecclesiastical courts succeeded in attracting much business because they offered a distinctly superior quality of justice;[3] and even in this country the victory of the common law courts over these particular rivals was no easy victory.[4] In the latter part of the fourteenth and in the fifteenth centuries the common law courts had no such keen competitors. We shall see that the absence of competition had its usual results. It is not until they are again obliged to struggle against the new jurisdictions exercised by the Chancery, the Council, and the Admiralty,[5] that we can see a development in the law in any degree comparable to the development which took place in this period.

Constitutional law.

The age of Bracton was one in which such fundamental questions as the relation of the king to the law, and the nature and powers of the body which can control the king, were the burning questions of the day. These questions had been raised by the events of the crisis which led to the granting of Magna Carta; and they were new to the lawyers. The answer which the lawyers gave to them was a matter of vast importance both to the constitution and to the common law. Would they, as the royal judges of the king's court, follow their Roman authorities, and hold the view that the common law was the king's law—

[1] Bracton's Note Book case 73 and note—an attempt to evade a prohibition by the plea that the court is seeking to enforce a testament, not of land, but of the money for which the land is to be sold; E.H.R. xii 653 William of Drogheda advises that, to evade a prohibition, nothing should be said of the true cause of action, "nec quod petit aliquam pecuniam, sed quod deducatur ad penitenciam, vel dic, quod ecclesiæ reconcilietur, et sic indirecte potest consequi quod non potest directe;" this might be very effectual; if A sues B, and B is excommunicated, B cannot while excommunicated get a prohibition, so that C could sue him effectually in the ecclesiastical court, Bracton's Note Book cases 552, 1403.

[2] Ibid, case 351, a plaintiff attached to answer for having proceeded in the ecclesiastical courts after a prohibition, says he so proceeded, "quia ibi maturius justiciam habere potuit;" cp. vol. i 415 for what happened at a later period in the case of the Court of Requests.

[3] Esmein, Histoire du droit Français 321 and n. 1; in the *Libellus domini Bertrandi*, there cited, it is said that the preference for the ecclesiastical courts is "pro communi utilitate quia multi magis eligunt vinculum ecclesiæ quam vinculum temporale, et ante dimitterent contractus facere, sine quibus vivere non possunt, quam se supponerent curiæ temporali." This book was an account of the "Dispute of Vincennes" (1329) in which the claims of the rival jurisdictions were discussed, Esmein, op. cit. 718.

[4] Below 305.

[5] Vol, i 459-465, 509-514, 553-558.

"a trusty servant of the crown?"[1] Or would they adhere to the older Teutonic traditions,[2] adapt them to the new situation created by the grant of Magna Carta, and so strengthen the old idea that law is a rule of conduct independent of the king—thus making the law the bond uniting the various parts of which the body politic consists?

Bracton strongly holds that the king is supreme in his realm.[3] He cannot be sued in his own courts.[4] If he does wrong he must answer for it to God alone.[5] The acts and deeds of the king must not be disputed in the royal courts till the king's pleasure be known.[6] But Roman influence has not as yet overcome the traditional Teutonic ideas. In common with other mediæval lawyers and political philosophers,[7] he holds that the royal power should be exercised subject to the law[8]—"Non est enim rex ubi dominatur voluntas et non lex;"[9] and that the law should be passed by the counsel and consent of "the magnates" after due deliberation and discussion.[10] The law is the bridle of the royal power. Nothing is more fitting than that the king should, by respecting the law, repay the debt he owes to the law, which gives him his royal estate.[11] This is no diminution of power. Incapacity to err is the mark of the Deity.[12]

[1] On this subject see Bracton's Note Book i. 29-33; cp. Ehrlich, Vinogradoff Oxford Studies vi 12-51.

[2] Above 131-132, 195-196; below 435-436.

[3] f. 5b, "Parem autem non habet in regno suo, quia sic amitteret præceptum, cum par in parem non habeat imperium;" so ff. 52, 107, 368b, 412.

[4] Bracton's Note Book case 1108.

[5] f. 171b.

[6] ff. 5b, 6, "Si autem ab eo petatur (cum breve non currat contra ipsum) locus erit supplicationi, quod factum suum corrigat et emendet, quod quidem si non fecerit, satis sufficit ei ad pœnam, quod Dominum expectet ultorem. Nemo quidem de factis suis præsumat disputare, multo fortius contra factum suum venire;" cp. f. 34.

[7] Carlyle, Mediæval Political Theory in the West iii 52-74.

[8] f. 5b, "Ipse autem rex, non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem."

[9] f. 5b.

[10] f. 1, "Quicquid de consilio et consensu magnatum et reipublicæ communi sponsione, auctoritate regis sive principis præcedente, juste fuerit definitum et approbatum."

[11] This thought is expressed in some of the political songs of the period, see Political Songs (C.S.) 74:—

"Rex Saül repellitur quia leges fregit,
Et punitus legitur David mox ut egit
Contra legem: igitur hinc sciat qui legit,
Quod non potest regere qui non servat legem;"

ibid 115:—

"Legem quoque dicimus regis dignitatem
Regere; nam credimus esse legem lucem,
Sine qua concludimus deviare ducem."

[12] Bracton f. 107b, "Exercere igitur debet rex potestatem juris sicut Dei vicarius et minister in terra, quia illa potestas solius Dei est, potestas autem injuriæ diaboli et non Dei;" Political Songs (C.S.) 105, 106:—

Bracton therefore conceived of the king and his servants as ruling according to a law which bound all the members of the kingdom, high and low alike. To all alike the same justice was due.[1] The king's servants did their work not merely as royal deputies depending solely on the king, but as the dispensers of a law which should bind all within the realm—king and subject alike.[2] It was an idea which came naturally to the judges of courts who were born in the atmosphere of ideas which conceived of the law as declared by the court, and not by the king or lord whose court it was.[3] And so it happened that in no branch of the law were Roman doctrines more decisively rejected. In no branch of the law did the older ideas as to the nature of the law and as to the powers and position of the court more signally triumph.

In many countries in Europe at this period these views as to the position of the law and the courts which administered it, which were essentially Teutonic in their origin, held sway.[4] They represented the commonly received principles upon which society rested.[5] But in England they were destined to have a development which was unique in its continuity. We shall see that in the succeeding centuries they were both strengthened and guaranteed by the cessation of the influence of Roman law, by the rise of Parliament, and by a development of the efficiency of Parliament which was largely due to an alliance between Parlia-

"Non omnis arctatio privat libertatem,
Nec omnis districtio tollit potestatem,
Nam, quod Auctor omnium non potest errare,
Omnium principium non potest peccare,
Non est impotentia sed summa potestas
Magna Dei gloria magnaque potestas;"

cp. Fortescue, De Laudibus c. 14. Somewhat the same thought is expressed by the Assizes of the Court of Burgesses of Jerusalem 26 in the sentence "qu'il n'est mie seignor de faire tort," cited Carlyle, op. cit. iii 32.

[1] f. 107, "In justitia recipienda minimo de regno suo (rex) comparetur."

[2] Bracton was not the only judge who held these views. See a letter of certain justices to the Bishop of Winchester, the Earl Marshal, and Hubert de Burgh with reference to a request made on behalf of the Earl of Albermarle, Royal Letters (R.S.) i no. 16; in effect they declined to suspend the execution of a judgment in an assize of novel disseisin, seeing that everything was done regularly, and that they were sworn to do justice to all without respect to persons. It is true that where the king's interests were concerned the judges would not proceed "rege inconsulto;" but when they did proceed the king's rights were treated like those of any other person, see R.P. i 186, 187—land given to the queen by the king was recovered, and the king gave compensation as any other donor might have done: Y.B. 21, 22 Ed. I. (R.S.) 54, 56, *Gislingham*, J., "For that it is against the common law and against the statutes to make such a taking in the highway, unless he be the king's bailiff, *notwithstanding any franchise which the king may have granted*, therefore this court adjudges," etc.

[3] Vol. i 40; above 196; Harcourt, the Steward and Trial by Peers 208; for similar ideas abroad see Carlyle, op. cit. iii 52-66.

[4] Above 131-132; cp. Esmein, La Maxime *Princeps legibus solutus est* dans l'ancien droit public Francais, Essays in Legal History (1913) 201-214; Gierke, Political Theories of the Middle Age 73-74; Carlyle, op. cit. iii 11-12.

[5] Above 121-122, 131-132.

ment and the common lawyers.[1] The result was the creation of a constitution which was stable because it was based upon the law. It was possible to distinguish between the abstract law and those who were thought to have perverted it. An appeal to the law has generally, until these last days, been the resource of those who were dissatisfied with their rulers. A clearer statement, a better enforcement of the law, and not its change, was for many centuries the aim of the English reformer.

But what if the king refused to obey the law? In the reign of Henry III. this was no abstract question of political science. Bracton hints that possibly in such a case the "universitas regni et baronagium" in the court of the king himself may restrain him.[2] But, as we have seen, the constitution of such a body as the Parliament of later law is not as yet fixed.[3] Nothing shows more clearly the transition state of the law of this period. Bracton lays down clearly enough the main characteristic of English constitutional law—its dependence upon the common law. He cannot as yet lay down any distinct remedy for a possible breach of the law by the king.

There is, indeed, a passage in Bracton, not found in all the MSS., but found in Fleta[4] (*circ.* 1290), which does lay it down clearly enough that the counts and barons are the king's masters, who must restrain him if he breaks the law.[5] This thought was not far from the minds of those who drew up Magna Carta, and of many statesmen and writers of Henry III.'s reign and later;[6] and Bracton's words "correspond with the principles of other feudal jurists" of this period.[7] Naturally they were often quoted in the seventeenth century; for they raise and answer the practical question—How can the king be made to obey the law? The fact that the question so raised remained unanswered till the seventeenth century is an eloquent

[1] Below 441-446; Bk. iv Pt. I. c. 1.

[2] f. 171b, "Nisi sit qui dicat quod universitas regni et baronagium suum hoc facere debeat et possit in curia ipsius regis." We get the same thought in the political songs of the period:—

> "Igitur communitas regni consulatur,
> Et quid universitas sentiat sciatur . . .
> Ex hiis potest colligi quod communitatem
> Tangit, quales eligi ad utilitatem
> Regni recte debeant."
>
> Political Songs (C.S.) 110, 111.

[3] Vol. i 352-355.

[4] Bk. i 17, 9; for Fleta see below 321-322. It is not in the Digby MS.—a fact of less importance than was once supposed, above 239.

[5] f. 34, "Rex autem habet superiorem Deum scilicet. Item legem per quam factus est rex. Item curiam suam videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium habet magistrum, et ideo si rex fuerit sine fræno, i.e. sine lege, debent ei frænum ponere."

[6] For the similar opinion ascribed to the younger Despencer see vol. iii 289-290, 466.

[7] Carlyle, op. cit. iii 73; Harcourt, The Steward and Trial by Peers 208.

testimony to the feudal and personal character of the parliamentary contests of the later Middle Ages.[1] At the same time it is fair to remark that it would then have hardly been possible to settle this question satisfactorily, since the problem of sovereignty, to which it is intimately related, had not as yet been even envisaged.[2] As late as the end of the seventeenth century the English common law was the only body of law in Europe which had effected a reconciliation between the dogma of the personal superiority of the king to the law, and the dogma that the royal prerogative is subject to the law. But, as that reconciliation was then only effected after a rebellion and a revolution, it was obviously a feat too difficult for the childhood of the common law.

The Pleas of the Crown.

The machinery by which the central government brings the control of the law to bear upon all the subordinate officials and organs of government is gradually becoming perfected. Cases turning upon the exercise of this jurisdiction still form a large part of the pleas of the crown.[3] From the point of view of the development of the common law they form a most important part. We shall see that it was this control which did more than anything else to insure in the local courts—communal or franchise—a regularity of practice and procedure, and, consequently, a uniformity in the law which they administered.[4] In one way or another—by repeated amercements, by proceedings in error, by prerogative writs—their acts and their doings were constantly being tried by the tests of reasonableness and justice applied by the royal court. It is, perhaps, in that branch of the pleas of the crown which will contain our criminal law that we can see the most important developments. The procedure by way of appeal and the procedure by way of indictment still exist side by side.[5] But the former mode of procedure is gradually becoming merely subsidiary to the latter. The popularity of the writ de odio et atia had already shown that the procedure by way of appeal was liable to abuse.[6] The procedure by way of trial by battle, though still in use,[7] was rapidly becoming archaic. During this and the following century the judges continued to discourage appeals.[8] They seemed to regard them as valuable chiefly

[1] Below 414 and n. 6.
[2] Figgis, Divine Right of Kings (1st ed.) 32-33.
[3] Above 197; Gloucester Pleas pl. 12, 35, 44; Northumberland Assize Rolls (Surt. Soc.) 296.
[4] Below 396-400.
[5] Above 197-198.
[6] Vol. i 57; Bracton f. 123.
[7] Gloucester Pleas pl. 87, 73.
[8] Above 198; cp. Gloucester Pleas pl. 20; the judges use the jury to help them in deciding points connected with appeals, ibid pl. 20, 76; Eyre of Kent 1313-1314 (S.S.) i 111; cp. ibid 117 *per* Spigurnel *arg.*; below 360.

because they supplied hints as to the existence of crimes which "pro pace observanda" should be enquired into by a jury.[1] It was coming to be felt more and more strongly that the suppression of crime was not the affair only of the injured individual or his kin.[2] In 1226 it was held that an agreement between a criminal and the relatives of a murdered man, even though it was cemented by a marriage, could not avail to save the murderer from an indictment, a trial by a jury, and a sentence of death.[3] It is clear that, as the appeal of the private accuser sinks into the background and the indictment is substituted for it, the state is gradually taking the place of the injured individual, and we are thus approaching to the modern conception of a crime. The appeal, therefore, is gradually decaying as a mode of criminal prosecution; and it was not allowed to be used as a mode of procedure in any but serious criminal cases. The facts must disclose the commission of a felony. Bracton tells us that an appeal will not lie for small injuries.[4] Such matters should be prosecuted by a civil action.[5] It will be in the action of trespass that litigants will eventually obtain a mode of getting compensation for wrongs under the degree of felony; and, by the insertion of the allegation that the king's peace has been broken, it will always be possible to remove such actions to the king's court.[6] But we shall see that it is not till the end of this period that this action becomes popular.[7] We can see, however, that the growth of a strictly criminal procedure and the discouragement of appeals were creating a need for such an action.

The king's court continues to draw rapidly to itself jurisdiction over the more serious offences. We see the offence of treason—as yet very elastic and by no means clearly defined.[8] We see that the term "felony" is already being applied to the more serious offences.[9] But outside these boundaries there is still a large tract of debatable land, as yet imperfectly surveyed,

[1] Gloucester Pleas pl. 106, 343; Northumberland Assize Rolls (Surt. Soc.) 92, 320, 321; Eyre of Kent 1313-1314 (S.S.) i 118 *per* Bereford, C.J.; ibid 124; below 360 n. 7.

[2] Bracton f. 142b, "Videtur etiam quod appellatus non solum tenetur appellanti, imo domino regi, sicut videri poterit per verba appelli, ut si dicatur, talis appellat talem, quod nequiter et in felonia contra pacem domini regis, etc., per quod videri poterit manifeste quod appellatus non solum tenetur appellanti, imo domino regi."

[3] Gloucester Pleas pl. 101; Northumberland Assize Rolls (Surt. Soc.) 117.

[4] f. 144, "Declinatur appellum propter parvitatem plagæ;" f. 145b; Gloucester Pleas pl. 20, 99.

[5] Bracton's Note Book cases 85, 287, 314, 843, 1250—these cases generally arise out of some dispute as to proprietary rights, which, in former times, might have been the subject of an appeal, above 197-198.

[6] Bracton f. 154b, "Cognoscere quidem (vicecomes) potest de medletis, plagis, verberibus, et consimilibus pro defectu dominorum, nisi querens adjiciat de pace domini regis infracta."

[7] Below 364. [8] Below 360, 449-451. [9] Below 357-358.

within the limits of which the king's peace, the peace of the sheriff, and the peace of the lord still reign together.[1] Bracton and the rolls of the king's court can still tell us of old customs and archaic words. We may read of hamsoken,[2] of the thief hand-habbende, and back-berende,[3] and of the old summary procedure in cases where the criminal is caught in the act,[4] of the laws of Athelstan[5] and of Edward the Confessor,[6] of the custom that the owner of stolen goods who catches the thief with the goods upon him acts as his own executioner.[7] Childwyte and blodwyte were still known in Kent;[8] and in Herefordshire the murderer could still compound with the relatives of his victim.[9] Under the name of *actio furti*, or appeal of larceny, we can still see the old process by which a thief can be pursued and goods vindicated.[10]

It is the rules relating to the principles of criminal liability that show the greatest advance in this period. We have seen that even in Anglo-Saxon times the criminal law had been slightly influenced by the higher ethical standards of Christianity.[11] The rise and growth of the canon law tended to increase this influence by giving to it a greater precision. Maitland has pointed out that Bracton's treatment of homicide has been influenced by a treatise upon the canon law written by Bernard of Pavia.[12] But, as we have seen, the problem to be solved by the canonist is different from the problem to be solved by the criminal lawyer. The first must say under what circumstances moral guilt is imputable; the second must say whether some definite offence has been committed. Now a consideration of what guilt

[1] Bracton ff. 154b, 155; for the house-peace see Borough Customs (S.S.) ii xxv, xxvi.

[2] Ibid f. 144b.

[3] Ibid ff. 150b, 154b.

[4] Ibid ff. 150b, 137—a man captured, "super mortuum cum cultello cruentato, morte dedicere non poterit, et hæc est constitutio antiqua, in quo casu non est opus alia probacione;" Bracton's Note Book case 138; Borough Customs (S.S.) ii xxi, xxii.

[5] f. 147; above 20.

[6] f. 124b.

[7] Northumberland Assize Rolls (Surt. Soc.) 70, "Consuetudo comitatus talis est, quod quam cito aliquis capiatur cum manu opere, statim decollatur, et ipse qui sequitur pro catallis ab ipso depridatis habebit catalla sua pro ipso decollando;" cp. Borough Customs (S.S.) i 73, 74; ii xxxiv; above 101-102.

[8] Bracton's Note Book case 753, "Si aliquis eorum habuerit puerum in fornicacione dabit childwyte, et si aliquis uxoratus habuerit puerum in adulterio erit in misericordia Dom. Reg. de toto mobili suo, et si aliquis eorum effudit sanguinem dabit blodwyte."

[9] Ibid case 1474, "Set dicunt quod talis est consuetudo in Urchinefeldia quod de tali morte, licet aliquis convictus sit, bene potest concordiam facere cum parentibus;" cp. Borough Customs (S.S.) ii xxxiii, xlii, xliii.

[10] Bracton ff. 151, 151b; above 111-114; vol. iii 319-320.

[11] Above 53-54.

[12] Bracton and Azo (S.S.) App.; thus Bracton (f. 120b) follows his model in his mode of treatment, dividing homicide into "corporal" and "spiritual," and saying that it may be committed "facto, præcepto, consilio, et defensione."

is morally imputable will lead us to make refined distinctions—to attach, for instance, some slight guilt to the man who kills by mischance, though we should not dream of holding him to be guilty of murder. From this point of view the doctrines of the canonists may, as Maitland has said, have tended to maintain the rigour of the older system which made a man responsible for acts even though only remotely connected with the damage caused.[1] And in those days to hold a man responsible for killing was to hold him liable for murder.[2] The kinds of homicide and the degrees of punishment are not yet nicely adjusted. But, from another point of view, the insistence upon the element of moral guilt, which, in the eyes of the canonist, varied the penance to be imposed, helped to overthrow the older system. Bracton lays stress upon this element of moral guilt. He would hold that homicide is not committed unless the will to injure be present, for it is the will and the intent which create the offence ;[3] and thus neither the infant nor the madman can be held criminally liable.[4] Ideas such as these will prevent us from holding a man liable for those very remote consequences of his acts which the older system sanctioned. It may be that only inevitable necessity, only accident in doing a lawful act in which there is no element of negligence, will excuse; for it is only in these cases that there is no moral guilt.[5] But the idea that moral guilt of some kind must exist begins to introduce a new phraseology, using the language of morals, which tends to discredit the older rules. The older rules, it is true, still live on. "The man who commits homicide by misadventure or in self-defence deserves but needs a pardon."[6] The deodand[7] was thought unreasonable by Bracton ;[8] but it had many centuries of life before it. In spite, however, of these survivals the new phraseology which uses the language of morals will play a great part in the development of the criminal law. Moral distinctions will supply a rough test which will help us to draw a wavering line between the spheres of crime and tort, and between crimes of varying degrees of gravity.

[1] Above 51-52.

[2] Bracton and Azo (S.S.) 235.

[3] f. 136b, "Crimen (homicidii) non contrahitur, nisi voluntas nocendi intercedat, et voluntas et propositum distinguunt maleficium, et furtum omnino non committitur sine affectu furandi."

[4] Ibid, "Cum alterum innocentia consilii tueatur, et alterum facti imbecillitas excusat."

[5] Bracton ff. 120b, 121 ; P. and M. ii 476, 477 ; vol. iii 377-382.

[6] P. and M. ii 477-482 ; Bracton ff. 132b, 134 ; below 359 ; vol. iii 312-313.

[7] Above 47.

[8] f. 136b, "Recte enim loquendo, res firma sicut domus vel arbor radicata, quandoque, non dant causam nec occasionem, sed facit ille qui se stulte gerit, nec equus multotiens."

The Land Law.

The land law in a feudal state, even in a state so imperfectly feudalized as England, is a far more important branch of law than it is in modern times. The land is the source of many legal relations which in modern times would come under such rubrics as justice and police, master and servant, employer and labourer. Therefore, when we say that the royal court is settling the principles of the land law, we say not only that it is settling the principles of the oldest—the common law part of the law of real property; we say also that it is settling that branch of the law which governed many and varied legal relations of the majority of Englishmen.

The tenures known to English law are being reduced to their final and permanent form. We can distinguish the free tenures from unfree or villein tenure; and from unfree tenure we can distinguish the tenure of those who hold land on the ancient demesne of the crown. In the nature and incidents of the services of the knights who are bound to serve in the king's army; of the monasteries and churches who are bound to perform no services, or at most to pray for the souls of the pious or repentant donors by whom they have been enfeoffed; of that miscellaneous class of *servientes* who are bound to perform for king or lord services of all kinds, dignified, useful, or menial; of the yeomen who are bound sometimes to pay a money rent, sometimes to perform agricultural services, sometimes to do both; we see the great types of free tenure—knight service, frank-almoin, serjeanty grand and petty, socage.[1]

It is not always possible to say what are the substantial differences between free and unfree tenure. We shall see that the services of the free socage tenant are sometimes not very different from those of the tenant in villeinage.[2] But the procedural difference is clear enough. The free tenant has, the unfree tenant has not, a right to use the varied forms of action provided by the royal court for the protection of the freeholder's interest in land. The freeholder is practically independent of his lord's court. His lord is fast becoming merely a landlord.[3] The villein is entirely dependent on his lord's court. It is clear that the law laid down by the royal court for the free tenures will be different in many respects from that customary law which will be applied in the manorial courts to the unfree tenures. Here I am dealing with the free tenures. I shall say something

[1] For these tenures see vol. iii. 34-54
[2] Vol. iii 31-33, 52; Vinogradoff, Villeinage 81-83.
[3] Vol. i 178, 179.

of the development of the law relating to unfree tenure in the following chapter.[1]

The law relating to land held by free tenure is being gradually shaped by the working of the various remedies by which the interest of the freeholder is protected. His interest is protected by a whole series of remedies, possessory and proprietary. The possessory assizes enable him to recover his seisin if he has recently been deprived of it. The writ of right enables him to recover a seisin lost at a remote period in the past. Between the two come various writs of entry which enable him to recover a seisin which he has lost too long to be able to bring an assize.[2] Some writs of entry may easily shade off into writs of right.[3] All these varied actions are real actions. Bracton, it is true, sometimes seems to confine the term "real action" to the proceeding by way of writ of right.[4] The assizes are either "possessoriæ petitiones"[5] or personal actions.[6] The writs of entry, he considered, had some resemblance to a real action.[7] But all these proceedings are real actions in the sense that the plaintiff will recover not merely damages but seisin of the land which he claims.

The scope of these real actions is far more limited than that of the Roman real action. It is, in fact, limited in three ways. They only lie for land.[8] They only lie for land held by free tenure.[9] They only lie for certain interests in land held by free tenure. All these limitations have influenced the formation of our land law. The first clearly distinguishes the property which can be specifically recovered from that which cannot. The second, as we have seen, causes the law relating to land held by unfree tenure to be developed in a different manner from the law relating to free tenure. The third will still further confine the law of real property to certain specific interests in land. We begin to see the effect of this third limitation in the law of Bracton's day.

We have seen that the real actions are not available to the termor, to the man, that is, who holds for a term of years.[10]

[1] Below 379-381. [2] Vol. iii 11-14; Bracton f. 112b.

[3] Ibid, ff. 39, 113, 284; f. 327, a plaintiff claims land as his own (jus merum), "tunc adjiciat et unde idem non habuit ingressum nisi per talem, etc. [the form of a writ of entry, vol. iii App. Ia 1]. Et ita quod faciat mentionem ingressum, statim incipit breve de ingressu esse breve de recto, ex narratione petentis, nisi tenens ingressum elegerit."

[4] ff. 102, 102b; see vol. iii 3-4 for Bracton's use of the term "real action."

[5] f. 103b. [6] f. 161b.

[7] ff. 318, 318b; Bracton's Note Book case 803 note. A view can be demanded as in a real action, see e.g. case 517.

[8] f. 102b; see vol. iii 322 for this doctrine.

[9] Above 201. [10] Above 205.

Bracton, it is true, recognized that it was unjust that the termor should be ejected. He would allow him a sort of real right;[1] and he did get some protection, if ejected by his landlord's feoffee, by the writ *Quare ejecit infra terminum*.[2] For all that he has no seisin, no possession which is protected by the freeholder's remedies. It is only the man who holds for life, or in fee simple, or in fee conditional,[3] who is so protected. It is clear that we have here a cause at work which will in time tend to narrow the meaning of the general term "seisin," and cause it to signify, not possession merely, but the possession of certain interests in lands held by a free tenure. The term "seisin" is not so limited till the close of the mediæval period;[4] but it is already clear that there are some things possession of which will be protected by an assize, and that there are others the possession of which is not so protected.

We see from Bracton's works that the incidents of these interests in land are not as yet finally fixed. The rule as to primogeniture is becoming universal.[5] The rule that there can be no will of land is recognized—but with a little hesitation.[6] There is still debate over the question of free alienation inter vivos.[7] We shall see that Bracton argues strongly in favour of free alienation. The old restraints in favour of the heir have disappeared; and, in the statement that by a gift to a man and his heirs, the heir acquires only by inheritance, "et nihil acquirit ex donatione facta antecessori,"[8] we see at once the means by which the freedom from these restraints has been secured and one of the roots of a famous principle of the law of real property. The powers which may be given and the restrictions which may be imposed upon ownership by the agreement of the parties to a gift are still uncertain.[9] There are many points in the interest of the dowress and of the tenant by the curtesy which await settlement.[10] The list of easements is not yet closed.[11] We have seen

[1] f. 220b, "Non magis poterit aliquis firmarium ejicere de firma sua quam tenentem aliquem de libero tenemento suo."

[2] Vol. iii 214, and App. Ia 14.

[3] For these terms see below 349-350; vol. iii 105-123.

[4] L.Q.R. i 324 seqq., an article by Maitland on the "Seisin of Chattels;" see below 581; vol. iii 88.

[5] Ibid 172-173.

[6] There are contradictory passages on this point, vol. iii 75 n. 4; cp. L.Q.R. vii 68—an account of a collection of thirteenth-century conveyancing precedents—no. 68 is a devise of land.

[7] Vol. iii 77-78.

[8] f. 17; vol. iii 75.

[9] Bracton's Note Book case 36; L.Q.R. vii 63, 64; no. 5 is a precedent of a conveyance to a man and his heirs and assigns, save Jews and religious houses; vol. iii 102-104.

[10] Ibid 187, 189-195.

[11] Bracton f. 221b, "Jura siquidem quæ quis in fundo alieno habere poterit, infinita sunt."

that it is not yet settled that the common law courts will not recognize the interest of one who holds *ad opus*, to the use of another.[1]

We do, however, see some of the causes at work which will render our law of real property difficult and complicated. The same piece of land may be the subject of many varied rights. One man may, as we have seen, hold in demesne, another in service. One man may have a seisin which will be protected by a possessory assize; and seisin for this purpose is soon acquired —as a rule seisin for some four days will suffice.[2] After the lapse of that short period the owner loses his right of entry, the disseisors gets the protection of the assize of novel disseisin, and the owner must sue by real action.[3] Another may have a right in the same land which he can successfully assert by means of a writ of entry; while a third may have a right which he can successfully assert in a writ of right. One man may have an interest for life, another may have an interest in fee, a third may be in possession as a termor. The Roman law may say that possession has nothing in common with ownership, and that two persons cannot at the same time be possessed of the same thing. Bracton, though he repeats the Roman rules, is forced to admit that possession insensibly shades off into ownership, and that two possessions may well exist together.[4] Seisin, relatively good or bad, is Bracton's theme. He may talk about "dominium"; but his "dominium" is really a seisin which no one can dispute.[5]

The term "estate" has not yet been applied to describe these varied interests which may exist together in land. We shall see that it was the word rather than the thing which was wanting. In Bracton there are hints, but only hints, of the modern use of the term "estate."[6] The freedom still allowed to tenants to create what interests they pleased by express agreement prevented any exhaustive classification, any accurate definition, of possible interests in land of free tenure.[7] Much was to be found in Roman law as to conditional gifts, and Bracton makes use of that learning to explain the effect of the various modes of enjoyment which could be prescribed by the will of the parties. To it we owe the peculiar conception of the fee simple conditional at common law. A gift to a man and the heirs of his body gives to

[1] Above 246; below 593-595. [2] L.Q.R. iv 33, 34; below 583.

[3] Ibid 583; some thought that the intruder, i.e. the man who e.g. takes land left vacant on the death of a tenant for life, could be ejected within the space of a year and a day, ibid 34; Bracton ff. 160b, 161; Britton ii 288; for the term of a year and a day, see vol. iii 69-70.

[4] f. 44 b, "Sic esse bene compatiuntur istæ duæ possessiones ad terminum et in feodo."

[5] Vol. iii 89-91. [6] Below 350-352. [7] Digby, R.P. 160, 168.

that man a fee conditionally upon the birth of issue. If issue are born, whether they survive or not, the condition is fulfilled, and he can alienate just as if the gift had been to him and his heirs. In fact, Bracton is far more inclined to borrow from Roman law, and to make use either of its learning as to conditions, or of the analogy of the dominium and the usufruct, than to coin any new word. If his successors had been as familiar with Roman terms, English law might well have been content with developing this or some other Roman analogy instead of coming by its peculiar doctrine of estates.[1]

Personal Status.

In the time of Bracton we still have a class of persons whose status is definitely unfree—who can be compared with the *servi* of Roman law. But this comparison is far less apt than it was in the time of Glanvil. The lawyers may still make the comparison; but they are forced to admit that their servitude is relative merely. They are *servi* only as against their lord. As Maitland puts it, "serfdom as treated by Bracton is hardly a status; it is but a relation between two persons, serf and lord; as regards his lord the serf has at least as a rule no rights, but as regards other persons he has all or nearly all the rights of a free man; it is nothing to them that he is a serf."[2] From the point of view of public law the distinction between free and servile status was almost immaterial. A villein might be guilty of a crime, or a crime might be committed against him. He was often obliged to serve on a jury.[3]

In any state, and especially in a feudal state, the rights which persons have in the land will give us some hints as to their status. Unfree tenure, knight service, socage, serjeanty, frank-almoin should, and, to some extent, do tell us something of the status of the tenant. But for all that we shall see that in the time of Bracton the conceptions of freedom of status and freedom of tenure are kept apart. A man may be free and yet hold by a villein tenure. He may be a villein and yet hold by a free tenure.[4] But in the case of those who held by unfree tenure it

[1] f. 44b, explaining that the two possessions of the termor and the freeholder are compatible (above 263 n. 4) he says, "quia usufructus per se stare potest in persona unius, et liberum tenementum per se in persona unius, et ille, qui habet terminum, non habet nisi jus utendi fruendi in alieno tenemento;" so f. 32b, the same thing is said of a reservation in favour of a donor of an interest for life or years. French law ultimately described the situation by the use of the terms "dominium directum" and "dominium utile," Esmein, Histoire du droit Français 240-242.

[2] P. and M. i 398.

[3] Vinogradoff, Villeinage 64-67.

[4] Below 577; ff. 168b; 170, "Est enim ratio et regula generalis in istis duobus casibus quod liber homo nihil libertatis propter personam suam liberam confert villenagio; nec liberum tenementum e contrario in aliquo mutat statum aut conditionem villani."

was peculiarly difficult to keep separate the conceptions of tenure and status. No doubt there are differences which justify the separation. A free man may throw up his holding and go away at his will. A villein cannot. The villein's property belongs to his lord if he likes to claim it.[1] But whether a man's status was unfree, or whether he was free and held land by an unfree tenure, he must seek protection for his holding in the manorial court. The free person was necessarily thrown into the society of the unfree.[2] Thus the line between status and tenure tended to become confused; and it is this confusion which has had much to do with the formation of the peculiar class of villeins. It is significant that Bracton places, at the close of his description of the law of persons, his description of the various classes of the tenants upon the ancient demesne of the crown.[3] The status of these various classes of persons is defined by reference to their rights in the land. We shall see that we cannot clearly understand the position of the villein unless we go behind the generalizations of the royal courts and look at the terms of his tenure, and at his actual life as he works and litigates in the manor.

Personal Property.

The law of personal property does not bulk large in Bracton's works. In an agricultural community the most valuable forms of personal property are bound up with the land and follow its fortunes. We shall see that the remedies for the dispossessed owner of goods are the old remedies[4]—the action of trespass is very new;[5] and at this period the scope of the action of detinue is possibly limited to the case where the owner has voluntarily parted with the possession of his goods to a bailee.[6] The law has not yet got a theory of contract.[7] Unless a sealed writing has been employed the action of debt must serve; and that action will not enforce simple executory contracts. If a sealed writing was employed various arrangements could be made which were enforceable by writ of covenant.[8] We have seen that in the time of Glanvil the royal courts were not wont to enforce these "privatæ conventiones."[9] In the time of Bracton their practice was somewhat enlarged; but they did not consider that it was their duty to make a regular practice of enforcing them.[10] In the case both of lands and chattels difficult

[1] Below 376, 381, 577.
[2] Below 376-377.
[3] ff. 7, 7b; Maitland, Bracton and Azo 78-83.
[4] Vol. iii 319-322.
[5] Below 364.
[6] Below 366; vol. iii 324-326.
[7] Above 204; below 367-369.
[8] Bracton's Note Book, cases 613, 890, 1058.
[9] Above 204.
[10] f. 34, "Tamen non solet aliquando necessitas imponi curiæ domini regis de hujusmodi conventionibus privatis discutere;" f. 100, the king's court will not interfere, "nisi aliquando de gratia."

cases could be settled, and complicated dealings were rendered possible, by a *finalis concordia*, or "fine," in the royal courts.[1] By this means a variety of duties could be enforced by a procedure which was comparatively speedy.[2] We shall see that in many of these matters the jurisdiction of the royal courts was supplemented by the activities of the local courts in the country and the boroughs;[3] but we naturally hear little of this in a book which is concerned mainly with the justice administered by the royal courts.

We have, in fact, reached the frontiers of royal justice, and are approaching the territory of the local courts and other rival jurisdictions. The collection of debts, the settlement of police cases, and the trial of petty delictual actions supplied then, as they supply now, a mass of legal business of which the central courts never heard. But in this period it is not the local courts but the ecclesiastical courts which were, owing to their extensive jurisdiction, the most formidable rivals to the royal courts. Matters testamentary and matrimonial, which were admittedly within their jurisdiction,[4] were given a far wider extension than they were given in later law. Not only was their jurisdiction over wills and intestate succession, over marriage and legitimacy, allowed, but also jurisdiction in certain suits by or against executors,[5] and in suits relating to chattels or money promised in consideration of marriage.[6] Suits relating to defamation[7] and violence to clerks[8] were not prohibited. One case even goes the length of deciding that a prohibition will not lie if the parties have consented to the jurisdiction. Bracton thought that this case went too far.[9] But, apparently, a defendant who has admitted the jurisdiction by appealing against a decision cannot get a prohibition.[10] Besides this there is the vague jurisdiction in cases of sin and moral fault, which the ecclesiastical courts largely exercised for the salvation of the sinner's soul.[11] That Bracton would have been content to leave permanently to other courts these large tracts of law is not likely.

[1] Vol. iii 236-245.

[2] Bracton's Note Book, case 520, a compromise between Alan Basset and the burgesses of Wycombe as to "vexationes et injuriæ" caused by the latter; case 546, the settlement of a debt; case 1834, abstracting a villein contrary to stipulations made by a fine; case 1867, encroachments on a common.

[3] Below 384, 387-389. [4] Vol. i 621-629. [5] Ibid 627-628.

[6] Bracton's Note Book, cases 341, 442, 570, 646.

[7] Ibid, case 629. [8] Ibid, case 444.

[9] Ibid, case 678; Bracton ff. 401b, 408; above 251-252. It was a matter of some practical importance in the thirteenth century; L.Q.R. vii 65, 6, several precedents are given containing this agreement; and cp. L.Q.R. vii 363 n. 2; Madox, Form. no. 157 (1247); Rievaulx Cart. 410; Eynsham Cart. i nos. 498, 362, 234; below 305.

[10] Bracton's Note Book, case 544. [11] Vol. i 619-621.

If the success of the royal courts during the last hundred years in attracting to themselves the legal business of the country were continued, it seemed likely that the matters falling within their jurisdiction would cover the greater part of the field of law. But for the present the royal courts had no rules dealing with many matters which, to a student of the civil and canon law, were clearly necessary to be considered in a complete treatise upon law. To fill these obvious gaps Bracton did what his predecessors had already done,[1] what many other lawyers of very different ages and countries had done, and for many centuries continued to do—he borrowed from the Roman law.

Bracton and Roman Law[2]

The extent of Bracton's debt to Roman law has been most variously estimated. Maine[3] thought that the whole of the form and a third of the contents of the Treatise were borrowed from Roman law. Reeves,[4] on the other hand, while he admitted that Bracton often borrowed the terms and maxims of the Roman law, thought the actual doctrines borrowed would not fill three pages of the Treatise. The Roman law, he thought, was "rather alluded to for illustration and ornament than adduced as an authority." Maitland[5] inclined to a modified form of Reeves's view. He admitted that Bracton copied and adapted Roman law, through Azo,[6] in certain parts of the first and second books of his Treatise (ff. 1-107). The first section thus copied and adapted occupies folios 1-10b. It deals with the subject matter of the first book of the Institutes—i.e. the

[1] Above 202-206.

[2] The general authorities upon this subject are Bracton and Azo (S.S.), by Maitland; Güterboch, Henricus de Bracton, tr. by Brinton Coxe; Scrutton, Roman Law in England 78-121, and L.Q.R. i. 425; Vinogradoff, Roman Law in Mediæval Europe 88-105.

[3] Ancient Law (10th ed.) 82: "That an English writer of the time of Henry III. should have been able to put off upon his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence." As Maitland points out, whatever we may think of the extent of Bracton's debt to Roman law, we cannot talk of "putting off"; there is no evidence that the study of Roman law was formally proscribed, and "we have plenty of evidence of the existence in this country of many men who were professional legists, and to whom we must attribute at all events some slight power of recognizing a fragment of the Institutes when they saw one," Bracton and Azo (S.S.) xxvii.

[4] H.E.L. i 531.

[5] Bracton and Azo (S.S.) Introd.; Bracton's Note Book i 9, 10.

[6] In the thirteenth century Azo was the head of the school of Bologna. He wrote a Summa of the first nine books of the Code and a Summa of the Institutes, which were thought highly of in the Middle Ages and up to the sixteenth century. He died about 1230; Bracton and Azo (S.S.) ix, x; Savigny, History of Roman Law in the Middle Ages chap. xxxvii.

law of persons—and the first titles of the second book—i.e. the first part of the law as to acquiring ownership. The second section comprises folios 98b-107. It deals with the generalities of the law of actions, and so much of the law of obligations as Bracton considered to be applicable to England. Maitland admitted, too, that at other points Bracton made use of doctrines borrowed from Roman and canon law. Thus in the law as to possession, in the criminal law, in the law of marriage, doctrines were borrowed and adapted for the purposes of English law.[1] But for the most part he considered Bracton's Treatise to be genuine English law, based upon the rules and forms of the royal court and upon the cases there decided. The capacity to create such a treatise out of these materials may indeed have been derived from the study of Roman and canon law. But this does not mean that actual rules of Roman law were made to change or supplant rules of English law: it means that the fruit of this study has been a legal rationalism employed, not upon the Roman texts, but upon the English sources of law.

The diversity of opinion upon this subject may be perhaps accounted for by the following considerations: We have seen that Bracton's Treatise was written just at the close of the period during which English law had been developed by men who knew something of the canon and civil law, and just at the beginning of the period when English law was to be controlled by men who knew little except the system which they had passed their lives in applying either at the bar or on the bench.[2] It has, so to speak, a double aspect. We see there the speculations, the theories, the arrangement, the technical language of the canonist and the civilian. We see also the original writs, the dependence on decided cases, the doctrines, more or less developed, which are characteristic of the common law. In reading books, as in looking at persons or pictures, it is the features which are familiar which strike us most. We remember them best; the details do not readily escape us; and so, half unconsciously perhaps, we are apt to lay the most stress upon them. The features which are not familiar we look at—we think we see them clearly enough; but there are no associations about them. The details escape us, and our memories carry away only a blurred impression. Their interest to us is by comparison small, and so, again half unconsciously, we deem them of less importance than things which we see more clearly. It is admitted that Bracton's Treatise has many of the terms and phrases and

[1] P. and M. i 114; ii 46, 114, 502; Bracton and Azo (S.S.) 221-224, 225-235.
[2] Above 229-230.

some of the doctrines of Roman law. It is also admitted that it has many of the doctrines of the common law. It is not perhaps strange that a Roman lawyer and a common lawyer will each see there much that is hidden from the other; and the element which he sees the most clearly he will pronounce to be the most important.

To estimate the extent of Bracton's debt to Roman influences we must look at the Treatise from the point of view of the thirteenth century. We must remember what the materials were for the making of a book upon the common law. We must remember what the canon and civil law were to the lawyers of that age.

In any age in which law is systematically studied and applied, the lawyer must have some general legal theory as to law in general, as to the nature of various rights which the law will protect, as to the nature of the duties to the state or to one's neighbour imposed by law, as to the various forms of procedure to be employed to enforce those rights and duties. He has not perhaps learnt any express theory about these matters. But it is impossible for him to read the forms of writs, the reasoning of cases, the provisions of statutes, systematic text-books, without acquiring methods of legal reasoning, and an instinctive sense of legal fitness. Because this sense is instinctive he would be puzzled to trace it to its various sources; for instinct is but knowledge so ripened by time that its sources are forgotten. But really it is due to the various elements which at different times have gone to the making of the various sources of law which he is studying—religious beliefs, varying views of public policy, analogy of foreign systems, immemorial custom, and sometimes logic. It is therefore of slow growth and characteristic of a mature legal system. But the authorities for English law at the time of Bracton consisted of the rolls of the king's courts, the incipient register of writs, a few legislative enactments, and Glanvil's Treatise. To suppose that Bracton could have obtained from the study of these materials alone the legal instinct needed to construct from them a philosophical treatise upon English law would be to suppose a miracle. He was inspired, as many lawyers all Europe over had been and were being inspired, by the legal instinct of the Roman jurisconsults, as interpreted by the school of the glossators.[1] The nature of this influence has been compared to the influence of the ideas of general jurisprudence or to the weight attached by our courts to American decisions.[2] But its extent is not adequately

[1] For the glossators see Bk. iv Pt. I. c. 1.
[2] Bracton and Azo (S.S.) xxviii, xxxi.

represented by such analogies. The prevalent political ideas which regarded Western Europe as theoretically subject to the sway of an emperor who was the successor of the emperors of Rome, the authority necessarily attached by scientific lawyers to an ancient system which seemed to provide for all cases, the activity of the Roman curia with its code of rules and its fixed formulæ, the sanction of the church,—all went to make the influence of the Roman and the canon law very different from, and far greater than, any external influences operating to-day upon mature bodies of law. We want no better illustration of the part which the civil and canon law had in forming the minds both of the lawyers and of the politicians of the period than the fact that Edward I., when he summoned his Model Parliament, borrowed a sentence from the Code to explain the political theory which such a representative assembly embodied.[1]

Analogies are apt to be misleading; but they tend to mislead the less if the things compared are near in date. Perhaps the closest analogy to the influence of Roman upon English law in this age of Bracton is the influence of Roman upon French law in the *pays de coutumes.*[2] Those who wrote summaries of these customs in the thirteenth, fourteenth, and fifteenth centuries used Roman law to supply a theory of contract, and to fill up gaps where the custom was incomplete. They used it, according to one view, rather as a "ratio scripta" than as having any imperative force as "jus scriptum." If in England the royal courts had continued to be staffed with men learned "in utroque jure," Roman law might have come to have had a very similar authority. It would have been used to fill up gaps, and thus to mould the custom of the king's courts—the common law itself.[3]

We have seen that the general part of Bracton's Treatise is contained in the first 107 folios, and that the remainder of the Treatise comprises various tracts upon the pleas of the crown, and upon certain of the more important forms of civil proceeding in the royal courts.[4] It is in this general part that we can see most clearly the influence of the Roman law; and, as Maitland has shown, we must, from this point of view, distinguish the

[1] "Ut quod omnes tangit ab omnibus approbetur," Stubbs, Sel. Ch. 485; the quotation comes from Code 5, 58, 5, 2; it was known in England; Matthew of Paris referred to it in 1251, Stubbs, C.H. ii 139 n. 3. In 1305 Edward summoned to Parliament from the Universities of Oxford and Cambridge, "quatuor vel quinque de discrecioribus et in jure scripto magis expertis," Palgrave, Parlt. Writs i 91.

[2] Esmein, Histoire du droit Français 791-792, 796-840.

[3] I cannot doubt that Stubbs was right when he said, C.H. ii 207, "Had the scientific lawyers ever obtained full sway in English courts, notwithstanding the strong antipathy felt for the Roman law, the Roman law must ultimately have prevailed, and if it had prevailed, it might have changed the course of English history."

[4] Above 242-243.

sections of this part which deal with the law of persons, the generalities of the law of things, and the law of obligations and actions (ff. 1-11, and 98b-107), from the sections (11b-98b) which deal with *donationes* or feoffments. We can see the same influence in other parts of the Treatise; but there it is largely concealed by the method of exposition, which is as a rule, founded upon the chronological order of the steps which may or must be taken in the action which is being described. My division of the subject will be as follows: (i) The sections of the general part in which the influence of Roman law is marked; (ii) the sections of the general part dealing with feoffments; (iii) the influence of Roman doctrine on English law; (iv) Bracton's use of the language of Roman law.

(i) The sections of the general part in which the influence of Roman law is marked.

The introductory sections of the Treatise are modelled on the introductory sections of the Institutes.[1] They also contain traces of the dialectical methods of the glossators.[2] But Bracton does not adopt the "quod principi placuit" of Justinian's definition of law;[3] in England the counsel and consent of the magnates is needed as well as the royal authority, and, as we have seen, he does bring out two distinctive features of English law—its dependence on procedure and precedent.[4] He follows Azo and the Institutes in his definitions of certain general terms —lex, consuetudo, jus, jurisprudentia, jus publicum, jus privatum, jus naturale.[5] Much of what Azo says as to the jus civile he omits—and sometimes he appears to think that the term means the special custom of a city.[6] The form of such legal introductions will always be coloured by the prevailing fashion of the day. Up to the beginning of the nineteenth century it would have consisted of Roman law more or less diluted. At the present day it would contain a flavouring of Austin and Maine. Bracton wrote his introduction in the prevailing fashion of his day—perhaps misapprehending some of the speculations

[1] Bracton and Azo (S.S.) 2-5.

[2] Bracton f. 1b, "In hoc autem tractatu sicut in aliis tractatibus, consideranda sunt hæc, scilicet quæ sit materia quæ intentio, quæ utilitas, quis finis et cui parti philosophiæ supponatur." Cp. this with William of Drogheda's Summa (E.H.R. xii 647), "In quolibet opere consideramus ista quæ sit materia, quæ intencio, quis finis, cui parti philosophiæ supponatur." Bracton goes on to say that his "materia" is the "casus qui quotidie emergunt et eveniunt in regno Angliæ," Drogheda that his is the "casus de facto qui in Anglia incidunt." Cp. f. 11, and Güterbock 38, 39.

[3] f. 1; Bracton and Azo (S.S.) 11, 13; above 252-253.

[4] Above 243-244.

[5] Bracton and Azo (S.S.) 19-33. In the definition of jus publicum (f. 3b) he uses very Roman terms, "Est autem jus publicum quod ad statum rei Romanæ pertinet, et consistit in sacris, in sacerdotibus et in magistratibus."

[6] f. 4; Bracton and Azo (S.S.) 39.

of his authority, as an English lawyer at the present day would be likely to misapprehend, let us say, a German speculation upon "Naturrecht."

Bracton then passes to the law of persons. He adopts the fundamental division of persons into free and slaves, identifying the servus with the villanus.[1] We shall see that this identification is of some importance in the history of villein status.[2] He then discourses of the ascripticius and the statu liber, giving to these terms—intentionally or not—quite different meanings from those which they possess in Roman law.[3] In dealing with the modes in which slavery may arise he departs widely from his model.[4] He then goes on to borrow a little from Azo as to the distinction between legitimate and illegitimate, male and female;[5] but he breaks off to give a disquisition of his own upon the varied orders in church and state, and upon the king and his relation to the law.[6] He then returns to Azo and proceeds to deal with the distinction between those who are sui and those who are alieni juris.[7] He borrows from the Roman rules relating to the restrictions of a master's power over his slaves; but he adds the English rule that no master has power over life and member, "quod vita et membra sunt in potestate regis;"[8] and he illustrates the rule that the villein cannot be utterly "destroyed" by a reference to the clause of the Great Charter saving his wainage.[9] Bracton did not perhaps consider how far these admissions affected his identification of the villein with the Roman servus. He goes on to say a little as to patria potestas and emancipation.[10] But English rules here fit in badly with Roman rules. The nearest equivalent he can find to emancipation is the antiquated law as to forisfamiliation—i.e. the provision made by a father for his son which may affect his right to the inheritance.[11] He mentions tutela and curatela; but he postpones his treatment of them till he comes to deal with the incidents of tenure.[12] He ends his treatment of the

[1] Bracton and Azo (S.S) 43, 45-49. [2] Vol. iii 491-500.

[3] The proper meaning of the term *ascripticius* is a man bound to the soil, but not a slave; Bracton makes it mean a sokeman on the ancient demesne. The proper meaning of the term *statu liber* is a slave who will be manumitted when some condition has been performed; Bracton makes it mean an escaped slave in de facto possession of his liberty.

[4] f. 5. [5] Ibid; Bracton and Azo (S.S.) 57.

[6] f. 5b; Bracton and Azo (S.S.) 57, 59, 61.

[7] f. 6; Bracton and Azo (S.S.) 65, 67, 69.

[8] f. 6. [9] For this clause see above 211 n. 6.

[10] Bracton and Azo (S.S.) 71, 73, 75, 77.

[11] Ibid. "Item emancipatione solvitur patria potestas, ut si quis filium suum forisfamiliaverit cum aliqua parte hereditatis suæ, secundum quod antiquitus fieri solet."

[12] f. 6b.

law of persons with the classical passage relating to the different classes of tenants upon the ancient demesne of the crown.[1]

Bracton has found that large parts of the Roman law of persons are not applicable to English law. Other parts—e.g. tutela and curatela—he finds are better treated of under other heads in an English treatise. He has omitted much, but he has added disquisitions upon sides of the law of persons which are peculiarly English.

The transition is now made to the law of things.[2] Bracton reproduces the Roman division into things in patrimonio and extra patrimonium, and attempts to follow a theory of Azo's that there are some things, such as servitudes, which fall into neither category. He then discourses upon res corporales and incorporales, res publicæ and res communes. In his treatment of the latter topic there are traces that he had read Azo hastily, and that he did not perhaps quite follow his argument as to the meaning of the distinction between them.[3] He passes on to res universitatis and res divini juris, misunderstanding, when dealing with the latter topic, the distinction between res sacræ and res sanctæ.[4] The various classes of res nullius is the next topic; and here again the sense is obscured by hasty copying.[5] With respect to some of these things, such as waif, wreck, and treasure trove, he is obliged to observe that, though formerly by natural law they belonged to the finder, they now, "efficiuntur principis de jure gentium;" and he is obliged to make the same modification with respect to wild beasts.[6] In other respects he copies Azo's account of what things, being res nullius, can be acquired by occupatio; but he feels that royal claims, as yet imperfectly defined, will prevent these rules from being applied to their full extent.[7] He must content himself with the vague generalization "nisi consuetudo se habeat in contrarium propter fisci privilegium."[8] The next subject is the acquisition of property by accessio.[9] He follows Azo as to accessio by operation of nature. In dealing with the first case of accessio by human agency—the case where A's property has been permanently joined to that of B—he does not follow Azo's disquisition, but he goes directly to

[1] Above 265; Bracton and Azo (S.S.) 78-83.

[2] f. 7b.

[3] Bracton and Azo 93.

[4] f. 8; Bracton and Azo 97.

[5] Ibid; he enumerates the various kinds of res nullius without stating their chief characteristic, "occupanti conceditur;" and then proceeds to say that in one case (that of the hereditas jacens) this characteristic, which he has not mentioned, fails.

[6] f. 8b, "Inprimis per occupationem eorum quæ non sunt in bonis alicujus, et quæ nunc sunt ipsius regis de jure civili, et non communia ut olim; sicut sunt feræ bestiæ."

[7] Bracton and Azo 103.

[8] f. 9.

[9] Ibid.

the Institutes.[1] He follows Azo in dealing with the accession of buildings to land; and he abstracts his disquisition upon the cases of the picture and the canvas, and the writing and the paper.[2] In one place his argument is hardly intelligible without Azo's book, to which he expressly refers us.[3] He follows him also in his law as to the purple woven into the garment, and as to trees and plants which take root in the soil. He then defines specificatio; and in Azo's words defines and distinguishes confusio and commixtio. Inventio he does not deal with; but he mentions the inventio of treasure trove, which must in English law be dealt with "inter placita coronæ."[4] Traditio too he will deal with later, when he comes to deal with donatio or feoffment.[5] This is a subject upon which English law has many rules, and it must be treated specially. He follows Azo closely in his account of the distinction between corporeal and incorporeal things; and adds to Azo's list of incorporeal things "advocationes ecclesiæ." Servitudes he promises to return to later.[6]

Bracton here finishes his account of the generalities of the law of property. He has described the terms and the leading conceptions which underlie this branch of the law. He has dealt with those parts of the law which must be drawn from Roman sources in the absence of any English authority. But he has noticed the most striking of the divergencies from Roman law which existed in the English law of his day; and, as in his treatment of the law of persons, so here, he reserves parts of the subject for the time and place when and where they can be most appropriately treated in a work upon English law.

Passing over for the moment the eighty-seven folios which deal with feoffments, we come to the section which deals with the law of obligations and actions.

When Bracton has dealt with the law of feoffments he has exhausted the largest part of the practical English civil law of his time. But there still remains the law of actions. The largest part of the Treatise will, as we have seen, be taken up with the account of certain actions.[7] But here he feels that he must say something of actions in general; and though, as we shall see, he has transplanted much of the Roman law of obligations into his account of feoffments, he has said nothing about obligations in general. Following Azo, he lays it down that actions are

[1] f. 9b, "secundum quod in Institutis;" Bracton and Azo 113, 117.
[2] ff. 9b, 10.
[3] f. 10, "ut in Institutis plenius inveniri poterit, et in Summa Azonis;" Bracton and Azo 121.
[4] Vol. i 85, 86-87.
[5] f. 10b; Bracton and Azo 123.
[6] f. 10b.
[7] Above 242-243.

born chiefly of obligations, and then proceeds to deal with the subjects of actions and obligations together.[1]

The term "action" is defined, and Azo's commentary upon the definition is summarized.[2] The distinction between civil actions and criminal proceedings is pointed out;[3] but Bracton does not follow Azo into his elaborate disquisition upon the twelve kinds of action and the twelve assertions one can make about each. Instead he turns to the topic of obligations, and gives a short summary of the law of obligations—dividing them into contractual and quasi contractual, delictual and quasi delictual.[4]

Dealing first with contractual obligations, he follows Azo's explanation of the various methods in which a contract can be made—the varied vestments which clothe a pact and turn it into a contract. These are of six kinds—re, verbis, scripto, consensu, traditione, and junctura.[5]

Bracton then proceeds to deal with the four classes of contracts re—mutuum, commodatum, depositum and pignus. He distinguishes mutuum and commodatum. But he makes a deliberate departure from the Roman law when he makes the commodatarius as well as the borrower by mutuum liable to restore the article or its price, "si forte incendio, ruina, naufragio aut latronum hostiumve incursu consumpta fuerit vel deperdita, subtracta vel ablata."[6] At the same time, in a passage difficult to reconcile with the former, he lays it down that for vis major or chance unaccompanied by negligence the commodatarius will not be liable. Maitland thinks that he either misunderstood the Roman text or that he deliberately altered it to suit English law.[7] Probably the last is the most likely explanation. Early law did not distinguish accurately between mutuum and commodatum, any more than the ordinary man distinguishes them in common speech.[8] The bailee of early law was, as we have seen, absolutely liable.[9] Bracton saw well enough the distinction in

[1] Bracton and Azo (S.S.) 134, 135. Cowell, in his "Institutiones juris Anglicani ad methodum et seriem Institutionum Imperialium compositæ et digestæ," adopted the same arrangement; for Cowell and his book see Bk. iv Pt. I. c. 3.

[2] Bracton and Azo 137, 138.

[3] Ibid 140.

[4] f. 99.

[5] For Azo's theories as to the vestments which will turn pacts into contracts, see Bracton and Azo 143—a picturesque passage, there cited, represents the feeble state of the naked pact till, having been clothed, it can face the world as a full-fledged contract, "cum enim paciscimur, pactum quidem sui nativitate nudum est . . . sed cum natum est, ante et retro aspicit et oculos aperit an præcesserit vel sequi possit vel statim insit aliquis contractus, cujus variis et grisiis induatur ut boream rabiemque procellæ expellat, et suum suo domino in agendo auxilium præbeat." By *Traditione* Bracton means to refer to the innominate contracts; by *Junctura* to the pacta adjecta.

[6] ff. 99, 99b.

[7] Bracton and Azo 146, 147.

[8] P. and M. ii 168 n. 2.

[9] Above 79-80, 110-111; cp. vol. iii 337-339.

fact between the two transactions. He saw no authority in English law for distinguishing their legal effects. It is true that he says that there may be cases in which vis major or accident will excuse; but this is "a concession to Romanism,"[1] which in view of his previous statement can have little practical effect.

After explaining the other two classes of real contract Bracton passes to the verbal contract or stipulation.[2] He defines it, and distinguishes the stipulations made "pure, aut in diem, aut sub condicione." He says something of penal clauses, and gives some instances of impossible conditions. He then gives a short account of certain causes of invalidity—mistake, promises for the benefit of a third person, impossibility;[3] but he has already said something of these matters when dealing with feoffment. About the stipulation for the benefit of a third person he is not very clear. Perhaps he did not understand the rule. He may have seen or heard of the bills or notes drawn by the Lombard merchants to order or bearer.[4] Of the four classes of stipulations known to the Institutes—judicial, prætorian, conventional and common—he only knows two, the judicial and the conventional. The first he identifies with the recognizance. Of the second he says with Glanvil that the king's court will not as a rule interfere to protect it.[5] This admission, as Maitland says, "gives a certain unreality to all that Bracton says of stipulations."[6] May we not add that it stamps as un-English and unpractical his whole theory of contract? The royal court would perhaps interfere more freely than in the time of Glanvil to enforce the privata conventio; but English law was as far as ever from the attainment of a theory of contract. Even at the present day English writers who discuss the general theory of contract use Roman terms borrowed from Savigny,[7] just as Bracton used the same terms borrowed from Azo. It was because English law was beginning to have a theory of conveyance that Bracton discusses such matters as conditions, force, fear, fraud, and mistake in connection, not with stipulation, but with feoffment.

Bracton then mentions the case of a plurality of debtors or creditors, and passes on to deal with certain classes of persons who cannot bind themselves by stipulation, such as the mutus, the furiosus, and the infans. He adds that the mutus might bind himself "per nutus vel per scripturam," founding his sug-

[1] Bracton and Azo 147. [2] f. 99b. [3] f. 100.

[4] Bracton and Azo 151. In Select Pleas in the Manorial Courts (S.S.) 152, at the court of the Fair of St. Ives (1275) we have mention of a sum due to one Brun "vel cuicunque de suis scriptum obligatorium inter ipsos confectum portanti;" see Bk. iv. Pt. II. c. 4 for some account of these instruments.

[5] f. 100. [6] Bracton and Azo 152.

[7] Anson, Contracts, Introd.

gestion upon the words of Justinian as to the all but conclusive effect of a writing purporting to evidence a stipulation.[1]

The literal contract is for Bracton the contract under seal.[2] He adds a passage from Azo which deals with a speculation as to whether we can be said to be bound by the letters of writing or their sense.

Bracton then mentions the consensual contracts—emptio venditio, locatio conductio, societas, and mandatum. He does not, with Justinian, expressly contrast them with the real contracts. "He is bound by the sacred text to say that the contract of sale is consensual. He has not the courage to say that it is real, and yet, as he has betrayed elsewhere (f. 61b) English practice demands either writing or some transfer of the thing, if there is to be a contract of sale."[3] When dealing with feoffments Bracton has already said something of sale and hire. Societas and mandatum have, as yet, no English equivalents, and he omits them.

Bracton then proceeds to enumerate the quasi contracts, but he does no more than enumerate them.[4] He then returns to contracts made traditione, as to which he refers to what he has said about feoffments, and adds a few words as to contracts made junctura.[5]

The title, "Per quas personas nobis obligatio acquiritur,"[6] next attracts Bracton's attention. He gives us some Roman phrases; but the whole form and principle of the Roman rule is altered by the statement that contracts can be made through agents.[7]

In dealing with the dissolution of contract[8] Bracton in the main follows Azo, adding to the classical modes the death of one of the contracting parties if the action is penal.[9] Omitting all references to the Aquilian stipulation, he closes with the Roman theory, which was afterwards to be substantially the theory of English law, "quod eisdem modis dissolvitur obligatio, quæ nascitur ex contractu vel quasi, quibus contrahitur."[10]

[1] f. 100. [2] f. 100b; Bracton and Azo 156.

[3] Bracton and Azo 157. At f. 61b Bracton had said, "Et cum arræ non intervenerint, vel scriptura, nec traditio fuerit subsequuta, locus erit pœnitentiæ, et impune recedere possunt partes contrahentes a contractu."

[4] f. 100b. [5] Bracton and Azo 159.

[6] Instit. iii 28.

[7] f. 100b; Bracton and Azo 160. [8] f. 100b.

[9] f. 101; but all English actions had a penal element, as in all there might be an amercement, below 279; even in debt there is a delictual element in the writ, Glanvil x 2, and the count, Nov. Nar. ff. 37b and 38b; see vol. iii 451-452, 576-578 for the effect of death upon a cause of action in contract.

[10] f. 101. Cp. Y.B.B. 2, 3 Ed. II. (S.S.) 196, 197; 3, 4 Ed. II. (S.S.) 145, 146; Countess of Rutland's Case (1605) 5 Co. Rep. at f. 26a where Bracton is cited; Langden v. Stokes (1634), Cro. Car. 383, "And the rule was remembered eodem modo quo oritur eodem modo dissolvitur;" Anson, Contracts (9th ed.) 288, "A contract must be discharged in the same form as that in which it is made. A contract under seal can only

Bracton has now concluded his summary of the law of contractual and quasi-contractual obligations. He should now deal with the delicts. But many of the delicts, e.g. theft and robbery, will be more appropriately introduced when he deals with the pleas of the crown.[1] Here he just mentions "crimina majora vel minima," and "injuriæ et transgressiones." In this we may perhaps see the felonies and trespasses of later law. Influenced by the civil and canon law he lays, as we have seen, some stress upon the mental element in wrongdoing.[2] The only quasi delict he mentions is the case of the "judex qui litem suam fecit;" and to incur liability the false judgment must have been given with knowledge of its falsehood.[3] We have here little more than generalities.

Bracton now returns to the subject of actions.[4] Following his authorities, he discusses various classes of actions—personal, real, mixed. Following Glanvil, he divides personal actions into criminal or civil. Criminal proceedings vary with the nature of the crime. But though he has classed all criminal proceedings under the head of actions arising out of wrong, and all civil proceedings under the head of actions arising out of contract, he goes on to show that there may be civil proceedings arising out of wrong. In a purely English passage he discusses the question whether a person can by his pleading give a criminal form to proceedings arising out of facts which would more appropriately only give rise to a civil action. This he holds cannot be allowed.[5] He then discusses the analogous question whether a plaintiff who has elected one method of procedure can change his course and adopt another. It is clear that Bracton has been thinking all through this passage of the appeal of felony on the one hand, the action for trespass on the other. Both are personal, both are founded upon wrong. But the first is a criminal, the second a civil, or at most only a quasi-criminal, proceeding.[6]

Real actions offer little difficulty to Bracton. The real action of English law is essentially the same as the real action of Roman

be discharged by agreement expressed under seal: a parol contract may be discharged by parol."

[1] f. 101.

[2] f. 101b, "Considerandum erit quo animo quave voluntate quid fiat in facto vel judicio, ut perinde sciri possit quæ sequatur actio et quæ pœna. Tolle enim voluntatem et omnis actus indifferens;" above 258-259.

[3] "Ut si judex scienter male judicaverit."

[4] f. 101b.

[5] f. 102, "Et si utraque pars voluerit criminaliter agere in civili, ut si quis actionem instituerit contra alium criminaliter cum sit civilis et diceret quod per feloniam excussisset pulverem de capa sua, vel quid tale . . . judex . . . deberet pronunciare appellum esse nullum, et causam civilem et non criminalem."

[6] For these proceedings see below 360-365.

law. We have seen that he qualifies the scope of the real action by explaining that in England it only lies for a res immobilis.[1]

Mixed actions are then described; and English parallels are found for some of the Roman mixed actions. But it is pointed out that all actions may in England be said to be mixed. All are rei as well as pœnæ persecutoriæ, because in all the unsuccessful party will be amerced.[2] The distinction between perpetual and temporary actions is noted; and the English rule is added that in a suit for franchises, "nullum tempus occurrit regi."

Various distinctions between actions are then stated in Roman terms.[3] They may be either in duplum or in simplum, against one or many defendants, direct or indirect, founded on possession or founded on ownership, confessoria or negatoria. Similarly the Roman classification of interdicts, founded on the recovery, the obtaining, and the retaining of possession, is copied, and illustrated from the possessory assizes.[4] Delictual actions are then dealt with. The various classes of delictual actions known to Roman law are enumerated, and identified with the corresponding English actions.[5] Thus the actio bonorum vi raptorum is identified with the appeal of robbery, the actio Legis Aquiliæ with the appeal for killing or wounding. The actio furti (which is confused with the condictio furtiva) is identified with the old procedure for the recovery of stolen goods.[6] The actio injuriæ is the action for assault and battery. The actio quod metus causa, the actio doli, the interdicts unde vi, quod vi aut clam, and de itinere privato are then described. Bracton here leaves Roman law and goes on to explain the English law as to the relation inter se of the varied actions available for the protection of seisin—the assizes, the writs of entry, the writs of right.[7] Præjudicial actions are next mentioned; but a new sense is given to them. They are not, as in the Institutes, actions to ascertain a fact. They are cases in which a defendant has raised some special plea, e.g. villeinage or bastardy, which must be settled before the plaintiff's case can be tried.[8]

Bracton's remarks on the courts which have jurisdiction over actions criminal and civil state English law as settled in his day.[9] His remarks on punishments are taken partly from the Digest,

[1] Above 261; vol. iii 322.

[2] f. 102b; f. 443b, the actions familiæ erciscundæ, communi dividundo, and finium regundorum are again mentioned and their scope explained.

[3] f. 103.

[4] f. 103b; see Bracton and Azo 178, 179 for an account of this very confused passage resulting from these attempts at identification.

[5] f. 103b.

[6] Bracton and Azo 182; above 111-114; vol. iii 319-320.

[7] f. 104; vol. iii 5-14.

[8] f. 104; Bracton and Azo 185.

[9] ff, 104b, 105-106,

partly from Azo. They contain the longest passage taken directly from the Digest.[1] The advice there given to the judge was, as Maitland says, "the sort of passage which came home to Bracton as enlightened and useful."[2]

It is in this section dealing with obligations and actions that the influence of Roman law appears most on the surface, and that for two opposite reasons. In the first place, there was nothing in English law equivalent to the Roman conception of obligatio; and therefore an attempt to read the rules founded on this conception into English law could not but cause confusion. In the second place, English law was beginning to get a scheme of actions of its own. This scheme of actions was both native and original; and it was being rapidly developed to meet the actual needs of the day. An attempt to read a Roman classification and Roman distinctions into the English actions was bound to fail. It led to a proper understanding neither of Roman nor of English law —but rather to a confused account of the rules of both. It is for these reasons that Bracton's excursions into these departments of Roman law have had very little influence on the development of English law. But nevertheless we must take account of them in order to estimate aright his general attitude to Roman law.

(ii) The sections of the general part dealing with feoffments.[3]

This was the branch of the English civil law upon which there was abundant authority; and its importance is clearly marked by the space allotted to it in Bracton's work. It is because it is real practical law administered in the royal courts that his treatment of it gives us the best idea of the extent to which Roman law really exercised a practical influence upon English law. We have seen that in his treatment of the law of persons and things Bracton had reserved certain subjects for fuller treatment in those parts of his work where an English lawyer would naturally expect to find them.[4] We find these subjects dealt with under the law of *donatio* because in Bracton's time they were all branches of this part of the law. Thus tutela and curatela are, as we have seen, naturally discussed with the incidents of tenure by knight service and socage; while the rules as to traditio are here separately discussed because they are the most fundamental part of the English conveyance. But this method of treating the subject goes much further. Bracton, as I have said, illustrates and explains this really practical branch of English law by principles which he has borrowed not only from the Roman law of property, but also from the Roman law of obligation. In

[1] ff. 104b, 105. [2] Bracton and Azo xxiv n. 1.
[3] See on this matter Woodbine, Yale Law Journal, xxxi 827.
[4] Above 273, 274.

discussing the causes which may invalidate a *donatio* Bracton discourses of "vis," "metus," and "error," adapting much law which he found in Roman law applied to the stipulation.[1] Similarly in discussing the capacity to make a donatio,[2] and the things of which a donatio can be made,[3] he borrows from various branches of Roman law. The methods by which it can be made introduce discussions as to the stipulation,[4] the contracts emptio venditio,[5] and locatio conductio,[6] the innominate contracts.[7] The modes in which a traditio may be made subject to conditions introduce us to a Roman classification of conditions.[8] The persons through whom a traditio can be made are described in Roman terms.[9] Even the case where a traditio is made to a "communis servus" is discussed.[10] We have Roman learning as to the causa possessionis; and the Roman rule of a person changing the cause of his possession is applied in a very English sense to the case of a feoffment in fee to the lessee for years or the tenant for life.[11] Servitudes are explained in Roman terms.[12] Homage is defined and explained in the terms of obligatio.[13] When they are applicable the actual provisions of the Code and Digest are cited in this and other sections of his Treatise.[14]

The Roman law is not only used to define and illustrate the outlines of the English law of property: it is used to solve many problems which may result from the working of its rules. Thus the Roman rules as to "falsa causa" are followed and explained.[15] If a gift has been made in consideration of a marriage which does not come off, the property given can be recovered, "quia terra est data ex causa data et causa non est sequuta."[16] The

[1] ff. 15b, 16, 16b.

[2] f. 12b, he mentions those under tutors and curators, and adds, "item nec surdus qui omnino non audit;" the exclusion of this class is intelligible enough if applied to the verbal contract. It does not make much sense applied to traditio; cp. 14b, as to the capacity of the ward to better his position.

[3] f. 14, "Item donari non poterit res quæ possideri non potest, sicut res sacra vel religiosa vel quasi, qualis est res fisci, vel quæ sunt quasi sacræ, sicut sunt muri et portæ civitatis."

[4] Thus (f. 15b) the thing given must be aptly described, "Oportet quod certa verba interveniant donationi congrua sicut et stipulationi ut si dicam, dabis mihi centum? Et respondeas dabo."

[5] f. 61b. [6] f. 62. [7] ff. 18b, 19.

[8] f. 19—many of the instances are taken from the Institutes, "si cœlum digito tetegeris," "si navis venerit ex Asia," "si Titius consul factus fuerit," "si Titius hæres non fit tu heres esto."

[9] f. 43b.

[10] f. 25b, "Item esto quod plures sint domini, et servus sit communis, si contrahet et stipuletur, quæro cui istorum dominorum, utrum uni vel ambobus?"

[11] ff. 32, 45.

[12] ff. 11, 221, 233. For references to the Digest see Digby, R.P. (4th ed.) 185. Roman influence on the development of the law of easements, through Bracton and otherwise, is appreciable, below 283, 284, 356; vol. iii 154; Bk. iv Pt. II. c. 1 § 9.

[13] f. 78b. [14] E.g. ff. 12b, 29b, 30b.

[15] f. 19b. [16] f. 23.

lord who takes by escheat succeeds "in universum jus quod ille habuit cui succedit."[1] The ward will have an "actio negotiorum gestorum" against the tutor who negligently conducts his affairs.[2]

It is clear from these illustrations that much of the phraseology of the Roman law of property and obligation has been used to illustrate and systematize the English law of property. As we have seen, English law has not yet got a theory of contract. The English law of property has acquired a certain number of rules of its own, though as yet the philosophy of that law is largely Roman.

(iii) The influence of Roman doctrine on English law.

It is in this first and general part of the Treatise that Bracton's debt to Roman law is most prominent. But all through the book we can see that Roman doctrine is used to illustrate and explain the principles of the law, or is worked, in a modified form, into its substance.

We see, perhaps, the most notable instance of the manner in which Roman principles have been worked into the substance of the law in Bracton's account of the assize of novel disseisin.[3] Roman rules as to possession have been applied and adapted to suit the needs of English law. As in Roman law, a disseisin takes place, not only when a man is actually ejected, but also when, having gone away, he is forcibly prevented from returning.[4] The disseisin may take place vi simply or vi armata.[5] If the disseisor uses arms, arms may be used in self-defence. In support of this proposition Bracton refers, not as the Digest refers, to the law of nature, but to the text "When the strong man armed," etc.[6] With the Digest he limits the right to use arms to strict self-defence.[7] The remedy is available not only against the actual disseisor, but also against those who have assisted or advised him.[8] The lord's liability for the acts of his "familia" is stated in Roman terms—but it is pointed out that in English law the defendant agent is equally liable.[9] Similarly another divergence is noted in the statement of the rule that the possession of movables and the possession of land for a term of years are not protected by the remedy available to the freeholder.[10]

We can see another instance of the same influence in the law of procedure. The English lawyers had begun to learn some-

[1] f. 30. [2] f. 44.
[3] For the Roman origin of this remedy see above 204-205.
[4] f. 161b, 162. [5] f. 162. [6] f. 162b.
[7] f. 163. [8] f. 170b, 171. [9] f. 171b.
[10] f. 162, "Talibus injuriari poterit sicut aliis predictis, sed non hic succurritur eis per tale breve."

thing of the Roman exceptio. They had learned to make many defences to an action besides the flat denial which had formerly been the only defence possible.[1] "The new idea set up a ferment in England and elsewhere. When the old rigid rules had once been infringed our records become turbid with 'exceptions,' and a century passed away before our lawyers had grasped the first principles of that science of pleading which in the future was to become the most exact, if the most occult, of sciences."[2] We are not surprised to find that the style of some of the papal rescripts of the period is not unlike that of our English writs.[3] In them we meet phrases which are still familiar to English lawyers—"Mandamus firmiterque precipimus,"[4] "audita querela,"[5] "alioquin si quando ad nos exinde iterata querela pervenerit vos graviter puniemus."[6] William of Drogheda calls the papal rescript which authorizes judges delegate to hear the case "the original." Both at common law and according to the canon law we "impetrate" such an "original."[7] Some of the forms of a libellus in the ecclesiastical courts are not dissimilar to the writs and pleadings of the royal courts.[8] Drogheda gives some precedents of these, because, though they are, as he admits, useless in England in the ecclesiastical courts owing to the writ of prohibition, they may be useful to practitioners in the royal courts.[9] But the influence of the canon law went further than this. We can trace it not only in the development of the law of pleading and in the forms of the courts, but also in actual rules, one of which at least has had a large effect upon our law. The ordeal, as we have seen, was abolished at the bidding of the church; and it was this act of obedience which was one of the causes which made for the growth of the jury.[10]

In other branches of our law we can see traces of the same influence. The Roman law as to slavery had some influence upon the development of the law as to villeinage.[11] Some parts of the law of easements, and some parts of the doctrines as to a

[1] Above 106, 251.

[2] P. and M. ii 609.

[3] See e.g. Lib. 2 x Tit. 13 *De Restit. Spol.* c. 7.

[4] Ibid c 11; cp. vol. i App. XV.

[5] Ibid c. 4; vol. i 224.

[6] Lib. 5 x Tit. 3 *De Simonia* c. 21; cp. the writ of Justicies, "ne oporteat eum amplius conqueri," vol. i App. VI.

[7] E.H.R. xii 633; and for some papal mandates the style of which is not unlike that of the English writ, see Madox, Form. nos. 41, 44, 45.

[8] E.H.R. xii 654.

[9] Ibid 655, "Inserui predictos libellos, et habent locum tota die in curia rege, ecclesiastica nequaquam, propter regias prohibiciones."

[10] Vol. i 311, 323-324; cp. Bracton f. 338b; he is explaining that no certain term can be fixed for the length of the essoin of those who have gone on Crusade, "propter verba decreti domini papæ quod donec de ipsorum obitu vel redditu in regnum certissime cognoscatur, omnia sua integre remaneant et quieta consistant."

[11] Above 202, 264; vol. iii 491-500.

donor's liability to warrant the title of land not only to the purchaser, but also to his assigns, come from Roman sources.[1] Probably the debt of our law would have been heavier if the next generation of lawyers had been able to talk the language of Roman law as fluently as Bracton. This question of language we must now examine.

(iv) Bracton's use of the language of Roman law.

Even where the substance of the law is not Roman, Roman phraseology is used, and Roman texts are followed sometimes with considerable exactness. We have a good illustration of this in Bracton's treatment of prescription as applied to easements.[2] English law on this subject has come to be very different to the Roman law; but the idea of time, "beyond which the memory of man runneth not to the contrary," comes from Roman law through the canon law;[3] and, considering the influence of a finished technical language upon an immature body of law, it must be admitted that it is not unlikely that this branch of law might have been moulded after a Roman pattern if it had been stated and explained by Bracton's successors in the same way as he states and explains it.[4] The same remark will often occur to us in reference to other principles and rules, when, all through the Treatise, we see the use made of terms and phrases drawn from Roman law. We read of probatio plena and semiplena—terms peculiar to the method of proof adopted by the canon law.[5] We read also of res litigiosæ,[6] litis contestatio,[7] intentio,[8] and plus petitio.[9] Capitis diminutio is used of the degradation of a clerk,[10] and deportatio in insulam of outlawry.[11] Theft is manifestum or nec manifestum;[12] a smaller wrong, which affords no ground for a criminal appeal, is injuria, or atrox

[1] Holmes, Common Law 367, 385 (as to easements); 372-374 (as to warranty).

[2] Bracton f. 221, "Et ita pertinent servitudes alicujus fundo ex constitutione sive ex impositione de voluntate dominorum. Item pertinere poterunt sine constitutione per longum usum, continuum et pacificum, et non interruptum per aliquod impedimentum contrarium, ex patentia inter præsentes, quæ trahitur ad consensum. Et unde licet servitus expresse non imponatur vel constituatur de voluntate dominorum, tamen si quis usus fuerit per aliquod tempus pacifice sine aliqua interruptione, nec vi, nec clam, nec precario . . . ad minus sine judicio disseisiri non potest;" cf. Dig. 39. 3. 1. 23, "Si tamen lex agri non inveniatur, vetustatem vicem legis tenere. Sane enim et in servitutibus hoc idem sequimur, ut ubi servitus non invenietur imposita, qui diu usus est servitute neque vi, neque precario, neque clam, habuisse longa consuetudine velut jure impositam servitutem videatur."

[3] Salmond, Jurisprudence (2nd ed.) 151, 152, and references there cited.

[4] Cp. Schulte, Histoire du Droit De L'Allemagne (Tr. Fournier) 463-466, for the influence which Roman law had on the development of the German law of prescription.

[5] ff. 38, 302. [6] f. 171. [7] f. 172.

[8] f. 373, "Usque ad litis contestationem, scilicet quousque fuerit præcise responsum intentioni."

[9] f. 433b. [10] f. 123b.

[11] f. 136b. [12] f. 150b.

injuria.[1] The man who is in possession by the judgment of the court is in possession prætore auctore.[2] The Code is cited to show that a possessor cannot be compelled to disclose his title.[3] A person may be liable to be sued by the actio de tigno injuncto.[4] An hereditas is divided into unciæ.[5] To terms such as these Bracton no doubt sometimes gives meanings other than those which they had in Roman law. Sometimes he confessedly uses them only by analogy.[6] But the manner in which they are used throughout the Treatise perhaps shows us that Bracton often thought in the language of Roman law. To such a man the parts of his Treatise in which he had taken much from Roman law would not seem merely ornamental. If not practical English law then, they might well become practical at some future day. No doubt Bracton sometimes misunderstood the rules of Roman law when those rules had no equivalent in the actual law administered in the royal courts.[7] If an English lawyer of to-day, having written an account of a special branch of law of which he had practical experience, were, in order to make his work complete, to write a short account of other branches of law which he had got up for this purpose, he would be likely to make similar mistakes. Where these rules do represent the actual practical law, Bracton has a keen sense of their bearing, a thorough understanding of their importance.[8]

What, then, was the debt of Bracton and English law to the Roman law? We cannot say that the formal influence of the Roman law was overwhelming. The division of the general part of the Treatise into the law of persons, things, and actions is very much on the surface. The fact that 87 out of the 107 folios of which the general part consists is taken up with the law of feoffments shows that he had English law and the needs of English lawyers chiefly in his mind; and we have seen that by far the greater part of the Treatise is occupied by the discussion of those forms of proceeding in the royal courts which were of the greatest practical importance at the time. The Treatise is arranged as an English lawyer would expect to find it arranged. Hence it was easy to abridge it and to use it without the element of Roman law contained in it, or with only those doctrines

[1] ff. 155, 155b. [2] f. 196.

[3] f. 196, "Quicunque igitur in possessione fuerit juste vel injuste, ut prædictum est, et fuerit disseysitus et assisam portaverit, non est necesse ab eo quærere quo titulo vel quo jure fuerit in possessione, quia cogi possessorem, etc." The reference is to Code 3. 31. 11.

[4] f. 234. [5] ff. 95b, 374.

[6] f. 383, "Et hoc fieri possit (ut videtur) ad similitudinem exhæredationum, quia si quis debeat exhæredari, nominatim debet exhæredari, et eodem modo warrantus nominatim vocari."

[7] Bracton and Azo (S.S.) xix and note 1.

[8] See Yale Law Journal, xxxi 845 n., 847.

which had been so thoroughly Anglicized that their origin was forgotten. We cannot say that all Bracton's law is English in substance, that the influence of Roman law is merely formal. No doubt there is a body of thoroughly English rules; and Bracton differs at very many points from the Roman texts. But it is clear that he has used Roman terms, Roman maxims, and Roman doctrines to construct upon native foundations a reasonable system out of comparatively meagre authorities. Even when he is dealing with purely English portions of his Treatise, and discoursing upon the assizes, the writs of entry, or the writ of right, Roman illustrations and phrases naturally recur to him. And it is clear that his study of Roman law has led him to discuss problems which, when he wrote, were very far from any actual case argued in the royal courts. Thus he deals with accessio, specificatio, and confusio; and "where" says Maitland, "in all our countless volumes of reports shall we find any decisions about some questions that Azo has suggested to Bracton?"[1] Similarly he deals with many questions relating to obligation and contract, fraud and negligence, about which the common law had as yet no rules. In dealing with these matters he necessarily uses Roman terms and borrows Roman rules. It is, as we shall see, because his Treatise has given to English law at least one authority upon many matters which were outside the routine of the practising lawyer of the thirteenth century that his influence upon the history of English law has been so great. That his Treatise deals with such matters is due to the Roman law which it contains.

The Influence of Bracton upon the History of English Law

Both the MSS.[2] and the text-books[3] written on the law of England show us that "for a century or thereabouts our English lawyers were steeped in Bracton."[4] Thus it is ultimately to Bracton and to Bracton alone that we must look for an account of this period of the vigorous growth of the common law. In his works it is summed up and passed on to future generations.

[1] Bracton and Azo (S.S.) xx. The work of Blackstone (Comm. ii 261, 262) shows that English law was almost as destitute of authority upon these matters in the eighteenth century as it was in the thirteenth. Cp. Rex. v. Yarborough (1824) 3 B. and C. 91. In the case of Foster v. Wright (1878) 4 C.P.D. at p. 447 it is said, "Our own law [as to alluvio] may be traced back through Blackstone, Hale, Britton, Fleta, and Bracton, to the Institutes of Justinian, from which Bracton evidently took his exposition of the subject," and cp. Atty. Gen. of S. Nigeria v. John Holt & Co. [1915] A.C. at p. 613. The case of Acton v. Blundell (1843) 12 M. and W. 334, 335 is a classical instance of the free citation of the Digest on another point not covered by English authority.

[2] Above 237-238.

[3] Below 319-323.

[4] Bracton and Azo (S.S.) xxxiii.

But for his works all record of such a period might have been lost.

In the fourteenth and fifteenth centuries the authority of Bracton somewhat declined.[1] We have seen that the vigorous growth of English law, down to and during the age of Bracton, was largely due to the fact that English lawyers had gained a knowledge of legal principles, and a capacity of legal expression, from their training in the civil and canon law. But we shall see that, during the fourteenth and fifteenth centuries, though Roman law continued to be the basis of the law applied in the ecclesiastical courts and later in the court of Admiralty, it ceased to influence the development of the common law. The results of this were partly good and partly bad. They were good in that the native development of the common law and of the English constitution was assured. They were bad in that the common lawyers became wholly ignorant of that fund of legal principles and material for legal speculation which were stored up in the writings of the civilians and canonists, and in the texts upon which they commented. The common lawyers ceased, for the most part, to care for broad principles, and they ceased to speculate. The result was that in the fourteenth and fifteenth centuries the common law tended to become more and more technical and less and less rational.[2] It seemed likely that it would end by losing all grasp of broad principle, and become merely an "evasive commentary upon writs and statutes."[3] To the lawyers of such an age, the literary style, the large outlook, the vigorous commonsense of Bracton appeared strange. It was unusual—as unusual as in the days of Blackstone—to find a lawyer whose book was literature. His Roman law could not be understood by men whose knowledge of this subject (if they had any at all) was confined to a few maxims and proverbs.[4]

[1] Below 288 nn. 2 and 3. [2] Below 590-597.

[3] P. and M. i 204.

[4] In 1315 a difficult case came before Parliament. The king summoned "peritos juris civilis et canonici" to help the judges and those skilled in the common law, R.P. i 354, no. 6. This case shows that the common law is quite distinct from the civil law; and the Y.BB. show that, in consequence, the extent of the knowledge displayed by the common lawyers was very limited; cp. Y.BB. 21, 22 Ed. I. (R.S.) 294; 30, 31 Ed. I. (R.S.) 128; 12 Ed. III. (R.S.) 627; 15 Ed. III. (R.S.) 136, 238; 2 Ed. II. (S.S.) 71 n. 2; in Y.B. 6, 7 Ed. II. (S.S.) 70 Inge, J. apparently thought that the maxim "possessio fratris facit sororem esse heredem" was derived from Roman law; in Y.B. 22 Ed. III. Mich. pl. 37 the phrase *inhibitio novi operis* puzzled the court, and *Schard* came to the conclusion that it was some Roman law term "to which we pay no regard;" as early as Britton the *actio familiæ erciscundæ* had become "accioun de la mesnee dame de Herciscunde," ii 65; and *junctura* (above 275) had become "joynture," ibid i 156; R.P. iii 170 (7 Rich. II. no. 17) the commons say they cannot understand a treaty because it contains "plusours termes de Loy Civil;" Y.B. 31 Hy. VI. Pasch. pl. 1, doctors of civil law were called to explain to the court the meaning of *lis contestata*. No doubt some lawyers knew

Nor did English lawyers wish to understand it. The result of the Hundred Years' War was to create an intense, if narrow patriotism. The law and government of England were our peculiar possessions, of which we should be very proud, because we were taught to regard them as the causes of our national superiority. The civil law was for Frenchmen and others whose condition we were taught to consider to be plainly inferior.[1] Who would wish to study a system which the English lawyer had learned to think was the cause of this inferiority? Thus we are not surprised to find that in the fifteenth century some lawyers denied that Bracton's book had any authority;[2] and, this denial having been repeated, a slender stream of authority may be found for it right down to the seventeenth century.[3] The student of the history of English law will have little difficulty in seeing the absurdity of such dicta.

It is probable that the work of Bracton exercised its greatest influence upon modern English law in the sixteenth and seventeenth centuries. Maitland has shown that Bracton's Note Book was used by Fitzherbert when he composed his Grand Abridgment of the Laws of England in 1514.[4] All the cases in Fitzherbert of the dates covered by the cases in the Note Book are to be found there; and they are often arranged in the same order as they are arranged in the Note Book. Thus the Note Book became known to Coke;[5] and it is plain that Coke took much both from the Treatise and, through Fitzherbert, from the Note Book. We have seen that it was under the leadership and through the efforts of Coke that the common law courts began the conflict for supremacy with the new courts and councils which had sprung up in the Tudor period.[6] The issue of that contest would have been far more doubtful if Coke had not been able to draw upon Bracton's Treatise. He was able to use Bracton's work to liberalize English law, just as the parliamentary party used the

better than this; Selden cites (Diss. ad. Fletam viii 3) some Y.B. cases from an MS. of Ed. II.'s reign in which the Digest was cited and Roman law intelligibly discussed; but this MS. has disappeared, Y.B. 1, 2 Ed. II. (S.S.) xxx, and cp. Y.B. 3 Ed. II. (S.S.) xvi-xxi for an account of these passages; Maitland tells us that no MS. of the Y.BB. which he has seen contains citations from the Digest; but occasionally the reporter knows something of Roman terms either from Bracton or some other source, Y.BB. 3, 4 Ed. II. (S.S.) 162, 200; 11 Hy. VI. Pasch. pl. 30 (p. 38) the terms *nudum pactum* and *pactum vestitum* are correctly used; and Y.B. 9 Hy. IV. Mich. pl. 8 the reporter makes an apposite reference to Bracton to illustrate a remark of the judge as to actions founded on tort and on contract.

[1] Fortescue, De Laudibus cc. xxxiii-xxxvi.

[2] Fitz., Ab. *Garde* pl. 71.

[3] Plowden (1569) 357, 358; Rex. v. Berchet (1689), Shower 121.

[4] For this work see below 544-545.

[5] Bracton's Note Book i 117-121.

[6] Vol. i 414-415, 459-465, 509-516, 553-558.

doctrines to be found in Bracton touching the royal prerogative to show that the royal prerogative was subject to the law.[1] If the continuity of English law be our boast, let us not forget that something is due to the fact that there is an element of Roman law in Bracton's work—an element which prevented any further or larger "reception."

When the common law finally triumphed and assumed the jurisdiction once exercised by the rival jurisdictions of the Admiralty and the Star Chamber, it was clear that, though some few judges might deny Bracton's authority, his law was used. The classical instance is the case of *Coggs v. Bernard*, in which the principles of the law of bailments, as summarized by Bracton from Roman law, were stated by Holt, C.J., as part of the law of England;[2] and we shall see that, at a later date, his borrowings from the Roman rules as to servitudes helped to settle and to systematize our modern law of easements.[3] Coke's use of Bracton's books had really made it impossible to contend that they had no authority; and after the case of *Coggs v. Bernard* the absurdity of such a contention was obvious. Hale, in his history of the common law, had put the authority of the Treatise on a level with that of the records of the courts.[4] Blackstone recognized its authority in his Commentaries;[5] and in later cases which have turned upon points not covered by any more recent authority, the Treatise has been frequently cited and received.[6]

Legal and constitutional historians sometimes take divergent views of the same events. To the legal historian, who is looking mainly at the development of private law, the control gained by Parliament over the executive at the end of the thirteenth century is sometimes a matter for regret, because it is one of the causes which stopped the free and rapid growth of English law.[7] To the constitutional historian, who is looking solely at the development of public law, that very control is a matter for congratulation, because from it sprang the successful resistance to

[1] Case of Ship Money (1637) 3 S.T. 1136 judgment of Crook, J.; Trial of Charles I. (1649) 4 S.T. 1009.

[2] (1704) 2 Ld. Raym. 909.

[3] Bk. iv. Pt. II. c. 1 § 9.

[4] At p. 189.

[5] Comm. i 72.

[6] Ball v. Herbert (1789) 2 T.R. 253, 257; Gifford v. Lord Yarborough (1828) 2 Bing at p. 168, "The authority of Bracton has been confirmed by modern writers and by all the decided cases that are to be found in the books;" this, of course, is quite compatible with his authority having been overruled on certain points, Blundell v. Catterall (1821) 5 B. and Ald. 298, 292; Brinckmann v. Matley [1904] 2 Ch. 313. See also for other references to Bracton's authority Foster v. Wright, above 286 n. 1; Howe v. Smith (1884) 27 C.D. at p. 102; Cochrane v. Moore (1890) 25 Q.B.D. at p. 65.

[7] Bracton's Note Book i 7, "The supremacy of Parliament may have been worth the price paid for it; none the less the price was high."

absolutism in the seventeenth century.[1] This divergence of views is natural; but it is well to remember that both periods have played different but equally important parts in the development of English law. In the first place, the control gained by Parliament over the executive was not the sole cause of the changed character of the legal development of the following centuries. The new position, independent of the council and the crown, attained by the courts of common law, and the growth of a close legal profession, from the ranks of which the judges came to be exclusively drawn, had at least an equal share in securing this result.[2] In the second place, the supremacy of the law, in the sense in which Bracton had taught it, was guaranteed by the growth of the powers of Parliament; while the growth of these powers was helped forward and finally established by the technical skill of common lawyers,[3] who, because they were learned only in the common law, were not compelled by their technical doctrines to attribute too large a prerogative to the crown. Thus there was formed upon a firm basis that alliance between Parliament and the common law which eventually gave to the common law the victory over all its rivals,[4] and, with the help of Bracton's works, enabled it to appropriate and to settle upon native lines the dominion which it had won. We must not dissolve this old alliance, which has had so large a historical effect. During its period of growth and later the common lawyers helped to make Parliament an efficient and business-like assembly; and, in the seventeenth century, the cause of the common law was the cause of the Parliament in their hour of trial. If both the earlier and the later periods of our legal history have thus played an important part in securing the final result, the legal historian may fairly claim for Bracton and his works an influence, not only upon the history of English law, but also upon the general history of England.

[1] Stubbs C.H. ii 208, "To substitute the theoretical perfection of a system, which was regarded as less than inspired only because it was not of universal applicability, for one, the very faults of which produced elasticity and stimulated progress and reform whilst it trained the reformers for legislation, would have been to place the development of the constitution under the heel of the king, whose power the scientific lawyer never would curtail but when it comes into collision with his own rules and precedents"—Stubbs is of course speaking of constitutional progress, not of the progress of technical legal doctrines.

[2] Below 318.

[3] Below 430-434.

[4] Vol. i 516, 558, 571-573, 578.

CHAPTER IV

THE REIGN OF EDWARD I

The Settlement of the Sphere of the Common Law

THE reign of Edward I. ends one period and begins another, not only in legal history, but also in political, constitutional, and industrial history. In all these various sides of the national life we see the solution of many of the problems of Henry III.'s reign, and the beginnings of the new problems of the two centuries following. The political historian tells us of the annexation of Wales to England, and of the beginnings of our long rivalry with Scotland and France. The constitutional historian tells us firstly of administrative measures which develop and improve the machinery of local and central government devised by Henry II.; and secondly of the settlement of the constitution of Parliament, which solves the problem raised by the crisis of 1215, and introduces a new body into the political system, the rights and powers of which must be co-ordinated with the existing persons and bodies bearing rule in the state. The historian of industry and commerce tells us of the beginnings of an era of national as opposed to municipal regulation of trade. The legal historian must tell how this reign foreshadowed the main lines of the future historical development of our law. He must show how the settlement of the constitution and jurisdiction of the common law courts, the settlement of their relation to other courts and departments of state, and the numerous statutes which travel over all the branches of law, mark out the guiding lines of the mediæval common law, and leave traces which are visible to-day.[1]

The age of Edward I. was an age of constructive legislation. Frederick II. in Sicily, Louis IX. in France, Edward's father-in-law Alfonso X. in Castile, Magnus VII. in Norway, were all great

[1] Hale, History of the Common Law 194, says, "Upon the whole matter, it appears that the very scheme, mould, and model of the common law, especially in relation to the administration of common justice between party and party, as it was highly rectified and set in a much better light and order by this king than his predecessors left it to him; so in a very great measure it has continued the same in all succeeding ages, to this day."

lawgivers.[1] They all aimed at systematizing the confused tangle of customary rules by which their dominions were governed. Among these names Edward I.'s is not the least. His travels in Italy and the East, and his association with the French crusaders, gave him an opportunity of becoming aquainted with such monuments of the legislative activity of the age as the Assizes of Jerusalem, the Institutes of St. Louis, and the Coutumes de Beauvoisis, and with such jurists as Pierre de Fontaines, the younger Accursius, and Philippe de Beaumanoir.[2] But though he possessed some knowledge of foreign systems of law and of foreign jurists, he was one of the most English of our English statesmen. He made no violent changes. His legislation creates nothing entirely new. Much of it can hardly be understood without a knowledge of the past. Its phrasing recalls all the varied stages through which England had passed from the days of the Saxons.[3] Like the great kings of the house of Tudor, he could almost silently impress a new policy upon the country, suited to its altered circumstances, by the process of judiciously extending, adding to, or curtailing existing institutions and existing laws. He had, as Stubbs says, an instinctive genius for "the definition of duties and spheres of duty, and the minute adaptation of means to ends."[4]

The legal reforms of Edward I. occupy the earlier part of the reign. Most of them were made while Robert Burnell[5] was his Chancellor. If the comprehensive character of Edward I.'s legislation entitles him, as Lambard thought,[6] "to be accounted our English Justinian," Robert Burnell has some claim to be called our English Tribonian. He was born of a knightly family of Shropshire, near the family seat at Acton Burnell. We first hear of him in 1265 as a clerk to Edward I. He travelled with him to France in 1269, and seems even then to have been his future king's intimate friend. In 1270 Edward tried in vain to secure for him the position of Archbishop of Canterbury. On Edward's accession he acted as one of the three regents of the kingdom till the king's return from Palestine. In 1274 he was made chancellor, and continued to fill that office till his death in 1292. He became Bishop of Bath and Wells in 1275. But in 1278 the pope declined to appoint him to the See of Canterbury, and in 1280 he declined to appoint him to the See of Winchester,

[1] Stubbs, C.H. ii 116; Nichols, Britton i xvii.

[2] Y.B. 30, 31 Ed. I. (R.S.) xviii; for Accursius's visit to England, see above 227 n. 3.

[3] Stubbs, C.H. ii 118, speaking of the Statute of Westminster I.

[4] Ibid ii 116.

[5] Dict. Nat. Biog. art. by Professor Tout; Foss, Judges iii 63-67.

[6] Archeion 67.

in spite of the personal solicitations of the king.[1] Peckham, who held high ecclesiastical notions as to the relations between church and state, was naturally preferred to one who, as the king's prime minister, was responsible for a policy which made for the curtailment of high ecclesiastical pretensions.[2] Besides, some said that his life was not quite up to even ordinary ecclesiastical standards.[3] During his tenure of office as chancellor he was practically the king's Prime Minister. We hear of him on the borders of Wales, in France, and as active in the Chancery.[4] It was while he was absent with the king in France, 1286-1289, that the abuses existing in the administration of justice came to a head. He was one of the commission which was appointed to enquire into the various complaints; and, as a result, there was effected, as we shall see, a sweeping clearance of the bench.[5] He was active in the arbitration between the claimants to the Scotch throne; but he died before the decision was actually given. He was personally liked for his own qualities and for his efficiency.[6] The uninterrupted affection felt for him by the king is perhaps the best proof of his sterling qualities. He was, as Stubbs has said, the first of our great chancellors, as Hubert de Burgh was the last of our great justiciars.[7]

Edward and his great minister knew well that the character of the servants of the crown was as important as the character of the measures taken to settle the constitution of the country. "Pactum serva" was Edward's motto; and he tried to bring his ministers up to his own standard.[8] In this respect there was, in spite of frequent legislation,[9] urgent need of reform—so urgent a need that we may well wonder that the machinery of government had not broken down.

[1] Rymer, Fœdera ii 118—a letter written by Edward himself to the pope in 1278; Ann. Mon. (R.S.) ii 394. The chronicle of Waverley says that his proposed election to Winchester was "ad magnum instantiam regis et reginæ."

[2] Below 304-305.

[3] Ann. Mon. (R.S.) iii 373, the chronicle of Dunstable says, "supra modum ut dicitur lubricus habebitur;" Stubbs, C.H. iii 402 n.

[4] Possibly it was largely owing to him that the Chancery was fixed in London. The monk of Worcester, Ann. Mon. (R.S.) iv 477, says "ut apud Westmonasterium quasi in certo loco omnes indigentes et brevia petentes et jura sua prosequentes remedium invenirent ibidem;" cp. ibid ii 393.

[5] Below 295.

[6] The chronicle of Dunstable describes him as "populo affabilis in responsis," Ann. Mon. (R.S.) iii 373; the monk of Worcester (ibid iv 510), as "regi utilis, plebi affabilis, omnibus amabilis; vix nostris temporibus illi similis invenietur."

[7] Stubbs, C.H. ii 293.

[8] He settled a form of oath to be taken by the judges and councillors, Fœdera (R.C.) i 1009; for the oath taken by the judges of trailbaston see R.P. i 219; for that taken by the officials of the Exchequer and others see Red Book of the Exchequer (R.S.) iii cccx.

[9] Stat. West. I. cc. 24-30; Stat. West. II. cc. 37, 42, 44, 49.

During the reign of Henry III. the absence of a vigorous ruler had made itself felt in the growing and widespread corruption of the constantly increasing tribe of royal officials. Bracton, as we have seen, bears witness to the deterioration of the bench;[1] and the political songs of the time are full of similar complaints.[2] The cause is not far to seek. The royal officials, even the judges, were both poorly and irregularly paid.[3] Generally the other officials of the courts had no salaries, but were paid either from the damages recovered, or for the services which they performed for litigants.[4] Even in modern times it is difficult to draw a distinct line between services which are legitimate and those which are illegitimate. In the thirteenth century it never seemed to have occurred to anyone that it was possible or necessary to attempt to draw such a line. Such being the case, the crown cannot be altogether acquitted of blame. "That the king's servants were miserably underpaid," says Mr. Hall, "was admitted even then, and yet it was notorious that in most cases they were able to amass considerable fortunes. There could be little doubt where the money came from, and the crown by accepting large fines for the grant of offices which carried with them no legitimate

[1] Above 229-230.

[2] Political Songs (C.S.) 225-230:—

"Sunt justitiarii,
Quos favor et denarii
alliciunt a jure . . .
Revera tales judices
Nuncios multiplices
habent;—audi quare.
Si terram vis rogare,
Accedat ad te nuncius,
Et loquitur discretius,
dicens, Amice care,
vis tu placitare?
Sum cum justitiario
Qui te modo vario
possum adjuvare;
si vis impetrare
Per suum subsidium,
Da michi dimidium,
et te volo juvare. . . .
Clericos invideo
Suos, quos prius video
satis indigentes. . . .
Quando ballivum capiunt
Qua capta mox superbiunt
et crescunt sibi dentes."

See Liber Mem. de Bernewelle 171 for a tale as to how the justices were conciliated; for a detailed account of similar abuses in the local government taken from the Hundred Rolls for the County of Essex see H. E. Cam, Vinogradoff, Oxford Studies vi chap. iii.

[3] See the Eyre of Kent (S.S.) iii xl-xliii for the difficulty which the justices in Eyre had in getting their arrears of salary

[4] Vol. i 255-256.

emoluments worth speaking of, must be regarded as deliberately conniving at the robbery of the subjects." [1] The absence of Edward between 1286 and 1289 brought matters to a crisis. He was met upon his return with such loud complaints that he appointed a commission of enquiry.[2] The chancellor, Robert Burnell, was at its head, and with him were associated six other commissioners.[3] Writs were sent out to all the sheriffs in England directing all who had any complaints against royal officials to come and make them at Westminster.[4] The result was disgraceful to all branches of the civil service, and especially to the bench. It constitutes, to use Maitland's words, "our one great judicial scandal." [5] Of the judges of the court of King's Bench two out of three were removed; of the judges of the court of Common Pleas four out of five. The only two judges in these two courts found to be guiltless were John de Metingham and Elias de Beckingham.[6] Five of the itinerant justices, Adam de Stratton, chamberlain of the Exchequer, Henry de Bray, an escheator, Robert de Lyttelbury, clerk or master of the rolls, and a host of minor officials [7] were all found guilty of various crimes.

We can see from the chroniclers that the dramatic downfall of so many of the royal officials, high and low, made a great sensation.[8] In the "Narratio de Passione Justiciariorum" the episode was made the text of a satire which was composed of a mosaic of texts from the Vulgate.[9] The narratives of the chroniclers are both vague and highly coloured. As Prof. Tout says, "The king might send them precise copies of documents where the claim to an overlordship was in question:

[1] Red Book of the Exchequer (R.S.) iii cccxxx. Adam of Stratton was paid 8d. a day: he amassed a fortune of £50,000, ibid cccxxxvi.

[2] On the whole subject see "State Trials of the Reign of Edward I." (R.H.S.), edited by Tout and Hilda Johnstone.

[3] John de Pontoise, Bishop of Winchester, Henry Lacy, Earl of Lincoln, John de St. John, William de Latimer, William de March, William de Louth, State Trials, etc. xxi, xxii.

[4] See Fœdera (R.C.) i Pt. 2, 715 for a specimen.

[5] Mirror of Justices (S.S.) xxiv, xxv.

[6] There is a striking testimony given to the integrity of Beckingham in a judgment of the Parliament in 1292—"per quod idem Thomas [of Weyland, below 297] et alii de societate sua omnes tunc Justitiarii, præter predictum Elias, falsitati suæ consentientes, penitentiam suam sustinuerunt, et idem Elias semper fidelis extiterit et in servitio Regis fideliter se gesserit," R.P. i 84, 85.

[7] State Trials, etc. App. ii and iii. As to the persons coming within the scope of the enquiry as being "ministers of the crown," see ibid xxvii, xxviii; for a case against Solomon Rochester, one of the judges of the year 1292 see Select Cases before the Council (S.S.) 2.

[8] Most of the chroniclers deal with the episode more or less fully. Bartholomew Cotton (R.S.) 171-173; Annals of Waverley, Ann. Mon. (R.S.) ii 408; Annals of Dunstable, ibid iii 350; Wykes, ibid iv 319; Worcester, ibid iv 499; The French Chronicle of London (C.S.) 22; Rishanger (R.S.) 118; Nic. Trivit (E.H.S.) 316; cp. Liber Mem. de Bernewelle 224, 225.

[9] State Trials, etc. App. i.

but he would not supply details of the overthrow of his own instruments."[1] We shall perhaps gain the clearest idea of the extent of the prevailing corruption if we look at the career of one of the worst of these criminals—Adam de Stratton. Mr. Hall's detailed account of his crimes, drawn from the records, presents an amazing picture.

Adam de Stratton[2] was probably a native of Stratton in Wiltshire—a manor belonging to the Countess of Albemarle, to whose family belonged the post of hereditary chamberlain of England. He began his career in her service, and it was no doubt due to her influence that he was appointed to an office in the Exchequer. He found favour with Henry III. and Edward I., both of whom employed him in various offices of trust. In 1276 his patroness granted to him and his heirs the office of chamberlain of the Exchequer, together with several landed estates which appertained to that office. He now began to accumulate vast wealth by the disgraceful means which were exposed in the proceedings of the years 1289-1291. Even before the crash came he had been convicted by a jury (1279) of tampering with a charter in order to manufacture evidence for the purposes of a lawsuit in which his patroness was interested;[3] and it appears that in the same year he temporarily forfeited his office for bribery and extortion. He seems, however, to have weathered this storm. The investigations of the commission of 1289 showed him up in his true character. He stands out in the pages of the chroniclers as the worst of all the offenders. He is charged with all manner of crimes and enormities—murder, forgery, embezzlement, and even sorcery.[4] The recently published State Trials give us more exact information. In one of the cases printed by Mr. Tout the complainant states that Stratton induced him to come to him at the chapel of the Exchequer of the Receipt, that, with the help of his brother William, he forcibly took away the acquittance which he had given him for a debt which had been discharged, that he then broke the seal and threw the document into the Thames.[5] A jury acquitted Stratton of this charge; and in many other cases his skill and the precautions taken in the commission of the crime secured a favour-

[1] State Trials, etc. App. xxxiv.

[2] The following account of Stratton's career has been taken from the Red Book of the Exchequer (R.S.) iii cccxiv seqq.

[3] Round, Studies on the Red Book of the Exchequer 35, 36.

[4] Bartholomew Cotton's account (R.S.) 171-173 is particularly detailed and lurid.

[5] State Trials, etc. 85-89.

able verdict.[1] But he was convicted in one case of something very like highway robbery,[2] and in another of forging a charter in order to defraud the priory of Bermondsey of its lands.[3] All his property was forfeited to the crown; and, though he was ultimately pardoned on payment of 500 marcs, his property was not restored.[4] The documents relating to this forfeited property, which were preserved in the Exchequer, enable us to see the magnitude of the opportunities of oppression possessed by the king's servants. "The king's writs," says Mr. Hall,[5] "were issued on his behalf, and the records of the court were utilized as his private ledgers; his official residences were employed as store-houses for his plunder, and his victims were immured in the prisons of the court. The royal Treasury was also his own strong-box, and it was difficult to distinguish between his treasure and the king's."

Few of the other ministers of the crown had Stratton's opportunities; but, on a smaller scale, some did their best to imitate him. Thomas of Weyland, the chief justice of the Common Pleas, accused of being accessory to murder, took sanctuary and abjured the kingdom.[6] Henry de Bray, when taken a prisoner to the Tower, attempted suicide.[7] We need not suppose, however, that the crimes of all the accused ministers were equally heinous. The mediæval plaintiff often possessed a fertile and picturesque imagination. In some cases, no doubt, intimidation,[8] violence,[9] and deliberate perversion of legal forms[10] were proved. We can see, too, that the officials of the judges were, as the poem quoted above complains, only too ready to follow the examples of their betters; and that the professional feeling of their colleagues and masters led to the deliberate concealment of acts which

[1] His usual defences were somewhat as follows: "The plaintiff has no witnesses, and he (Adam) has the deeds, which are enrolled in the king's Exchequer. Who shall say that the king has enrolled a forgery?" "The plaintiff has his (Adam's) bond, but the seal is missing," Red Book of the Exchequer (R.S.) iii cccxxvii.

[2] State Trials, etc. 90, 91 (Roger Goodman of Bermondsey v. Adam de Stratton).

[3] Red Book of the Exchequer (R.S.) iii cccxxviii.

[4] Ibid; State Trials, etc. xxxi.

[5] Ibid iii cccxxx. For the story that Stratton was again employed (1293) to get a surrender to the king of the lands of the Countess of Albemarle see ibid cccxii-cccxv; Round thinks that there is no ground for this supposition, Genealogical Review i 8, 9.

[6] Ann. Mon. (R.S.) iii 355, "Quoddam homicidium per scrutarios suos fieri fecit, et ipsos homicidas postea receptavit;" cp. State Trials, etc. xxix, xxx.

[7] Bartholomew Cotton (R.S.) 175, 176.

[8] State Trials, etc. 5-11.

[9] Ibid 90, 91, App. ii no. 163.

[10] Ibid 36, 37.

ought to have been exposed.[1] But in other cases the complaints obviously come from disappointed litigants, who considered that any ruling adverse to them on any matter, however technical, must have been dictated by improper motives.[2] On the whole, "The reckless and ferocious villains painted for us by the chroniclers resolve themselves into a shadowy group of petty sinners: their enormous transgressions into rough extortion of money, or tyranny in a remote village on a small scale."[3]

It has generally been thought that the offences of Ralph de Hengham, chief justice of the King's Bench, were comparatively slight. In the rolls printed by Mr. Tout he was defendant in nine cases, in five of which he was acquitted.[4] But in one of these cases he was found guilty of a gross perversion of the course of justice;[5] and the amount of his fine of 8000 marcs actually exacted—£4303 6s. 8d. or 6455 marcs—points to more than mere irregularities.[6] The chroniclers are particularly vague as to the exact character of the offences of which he was found guilty.[7] But it is possible that there is a grain of truth in the traditional story which makes one of his offences venial and almost meritorious.[8] It is certain that in 1301 he was made chief justice of the Common Pleas; and this fact shows that he was not among the worst of the offenders.

Edward's energetic measures in stemming the tide of corruption were profitable to himself.[9] In many cases he accepted fines instead of inflicting punishments; and the chroniclers

[1] State Trials, etc. 40-45.

[2] Ibid 1-4; 18, 19.

[3] Ibid xxxiii.

[4] Ibid App. iii nos. 53, 94-101.

[5] Ibid 36, 37, "Postea in Parliamento domini Regis quod tenuit post Natale . . . quia predictus Radulphus (de Hengham) qui presens fuit non potuit dedicere quin sigillavit brevia per que preceptum fuerit vicecomiti quod caperet predictos Henricum et Nicholaum, nec potuit dedicere quin datum illorum brevium precessit capcionem inquisitionis per quam indictati fuerunt, nec compertum fuit per rotulos quod predicti Henricus et Nicholaus fuerunt per aliquam inquisitionem accusati . . . propter quod consideratum fuit quod predictus Radulphus sit ad voluntatem domini Regis, etc."

[6] Ibid xxxviii.

[7] Bart. Cotton 173 only mentions his fine; he is not specifically referred to in the Waverley Annals; the Dunstable Annals speak vaguely of "variæ transgressiones;" neither the Worcester chronicler nor Wykes know anything definite; R.P. i 48, 52, there is mention of two complaints, one of a false judgment, the other that the complainant was committed to prison though acquitted by "four inquests."

[8] There was a tradition that Hengham was fined 800 marks because he had altered a roll to reduce a poor man's fine from 13s. 4d. to 6s. 8d., and that the money had been employed to build a clock-house at Westminster, Y.B. 2 Rich. III. Mich. pl. 22 (p. 10); Coke, Fourth Instit. 255; Foss, Judges iii 40, 41; the tradition that he was punished for altering a roll goes back to 1329, Y.B. 8 Ed. II. (S.S.) xxii; vol. i 223 n. 3; for more of Hengham see below 318-319, 322-325.

[9] State Trials, etc. xxxviii, the total of fines paid by ten officials there recorded amounts to £15,591 10s. 4d.; Red Book of the Exchequer (R.S.) iii cccxxxi.

sometimes make it a ground of complaint that the erring officials should thus escape.[1] But for all that it cannot be doubted that the whole episode helped in no slight degree to forward the success of Edward's legislative reforms. All through the Middle Ages the standard of official honour was low. There were destined to be in the future other scandals both in the judicial and in the administrative branches of the civil service. But, so far as the bench was concerned, it was never again necessary to resort to such sweeping measures to secure the purity of the administration of justice. "Hengham's clock" was an object-lesson to many generations of judges.[2] When the clock-house was pulled down in 1715, a sundial was put up to mark its place, inscribed with the motto, "Discite justitiam moniti."[3]

We must now turn to the effect of Edward I.'s measures upon the actual rules, and upon the future development of English Law. I shall deal firstly with the law administered in the central courts, and secondly with the law administered in the local courts; and, under both these heads, I shall describe firstly the influences which shaped the development of the law, and secondly the development of the rules of law. Finally, I shall say something of the effect of the growth of the common law upon the law administered in the local courts, and upon the local communities which these courts represented.

I. The Law Administered in the Central Courts

The Influences which Shaped the Development of the Law

The first place among the influences which shaped the development of the law in Edward I.'s reign must be assigned to the Statute Book. It would hardly be an exaggeration to say that we must wait for the nineteenth century until we can again assign to direct legislation upon matters legal so great an influence upon the technical development of the law. I can here only briefly describe a few of the most important of these statutes. Their provisions will necessarily take an important

[1] Bart. Cotton 173, "Justitiarii predicti omnes finem fecerunt domino Regi . . . et ita interveniente mammona iniquitatis pax inter ipsos et regem reformata est, sed a servitio suo ipsos amovit;" the distrust of the judges which resulted from this scandal is illustrated by a petition in a case before the Council in 1295 that "knights who are not justices might be assigned as auditors," Select Cases before the Council (S.S.) 15.

[2] For the tradition about the clock see above 298 n. 8; Southcote, J., in Elizabeth's reign, declined to alter a roll, saying that he did not wish to build a clock-house, Foss, Judges iii 41.

[3] Dict. Nat. Biog. sub voc. Hengham.

place in the succeeding pages of this history. The Statutes of Westminster I. and II. (1275 and 1285) travelled over the whole field of law—procedure, real property, criminal law, constitutional law—amending and constructing.[1] The first of these statutes was "to a large extent based upon the results of the inquests held upon the articles of the Eyre of 1274."[2] It contains fifty-one chapters. They dealt (inter alia) with such matters as maintenance, champerty, peine forte et dure, scandalum magnatum, wardship, distress, limitation of actions, and essoins. The second of these statutes contains fifty chapters. It created the estate tail,[3] and contained provisions dealing with distraint,[4] dower, advowsons, mortmain, approvement of common, the writ of account, appeals for crime, remedies available to executors, the scope of the assize of novel disseisin, nisi prius, bills of exceptions,[5] process of execution for debt, and, perhaps most important of all, the issue of writs in consimili casu.[6] In a sense the most modern of Edward's statutes was the Statute of Wales (1284).[7] It was a codification of the rules of English law made for the purpose of introducing that law into Wales. It reminds us of our Indian codes and other codifying Acts of the nineteenth century. Perhaps, indeed, it is more than a coincidence that it is only the reign of Edward I. and the nineteenth century—our two periods of legislation upon matters legal—which have seen statutes of this nature. The Statute of Gloucester (1278) gave the landlord a remedy against termors who let their land lie waste, and protected termors whose landlords attempted to oust them by fictitious recoveries; it dealt with the case of killing in self-defence and by mischance; and, as we have seen, it fixed the competence of the local courts.[8] The Statute de viris religiosis (1279) introduced the law prohibiting gifts of land in mortmain.[9] The Statute de Mercatoribus (1283) and another statute of 1285 made special provision for the recovery of debts owed to merchants.[10] The Statute of Winchester (1285) improved and consolidated the police system of the country.[11] The Statute of Quia Emptores gave the tenant in fee simple of land held by free tenure (other than a tenant in chief of the crown) the power of free alienation, and defined the effect of such

[1] Statutes (R.C.) i 26, 71; Reeves, H.E.L. ii 22-51, 74-121.
[2] H. E. Cam, Vinogradoff, Oxford Studies vi 36.
[3] Below 349-350; vol. iii 114-116.
[4] c. 2.
[5] c. 31, vol. i 223-224.
[6] c. 24, vol. i 398 n.3.
[7] Statutes (R.C.) i 55.
[8] Ibid i 45; vol. i 72, 73; vol. iii 121, 214, 312.
[9] Statutes (R.C.) i 51; below 348-349.
[10] Statutes (R.C.) i 53, 98; vol. iii 131.
[11] Statutes (R.C.) i 96.

alienation.[1] With the statutes of the same date relating to the writ of Quo Warranto I have already dealt.[2] In 1297 there occurred the constitutional crisis which produced the confirmation of Magna Carta, and the Charter of the Forest, the Confirmatio Cartarum, and the (historically) aprocryphal Statute de Tallagio non concedendo.[3] With these documents should be mentioned the Articuli super Cartas of 1300, which included another confirmation of the charters, an enactment on the subject of conspiracy,[4] and other legislative improvements.[5] The Statute of Carlisle (1306-1307), directed against the practice of sending money out of the kingdom by religious houses, began the series of statutes directed against anti-national practices of ecclesiastics which culminated in the Statute of Præmunire of Richard II.'s reign.[6]

There are many other less comprehensive statutes ;[7] and, as the form in which a statute should be made is not yet fixed, we still find included among them documents which are statutory neither in form nor in substance. Thus we get certain administrative rules relating to the conduct of business in the Exchequer.[8] We have the royal writ Circumspecte Agatis—dealing with the spheres of lay and ecclesiastical jurisdiction—which has perhaps acquired technically the force of a statute.[9] We have the record of a case decided in Parliament on the subject of waste.[10] We have a royal writ relating to joint tenants, and an ordinance relating to the forests.[11]

[1] Statutes (R.C.) i 106 ; vol. iii 80-81.

[2] Vol. i 88-89.

[3] Statutes (R.C.) i 114-125 ; Stubbs (Sel. Ch.) 487, 497. The De Tallagio was regarded as a statute in the seventeenth century by both the royalist and the parliamentary party, 3 S.T. 1081 *per* Crawley, J., 1236 *per* Finch, C.J., doubting ; it is cited as a statute in the Petition of Right.

[4] This subject was dealt with also by 21 Edward I. R.P. i 96, and 33 Edward I. Statutes (R.C.) i 145 ; for the relation of these laws to each other, and the subject of conspiracy generally see vol. iii 401-407.

[5] Statutes (R.C.) i 136. [6] Ibid i 150 ; 16 Richard II. c. 5 ; vol. i 585-586.

[7] E.g. De officio coronatoris (1275) ; the statute de Bigamis (1276), dealing with the bigamus (vol. iii 297) and certain points connected with the law of real property ; the statute called Rageman (1276) ; statutes for the city of London (1285) ; Malefactors in parks (1293) ; Prison breach (1295) ; Writ of Consultation (1290, sometimes dated 1296), vol. i 229 ; De finibus levatis (1299), dealing with the forests, fines, sheriffs, judges of assize, nisi prius ; De falsa moneta (1299). For a full account of the statute called Rageman see H. E. Cam, Vinogradoff, Oxford Studies, vi 41-56 ; it seems that the term "Ragman" was a popular nickname for the Hundred Rolls derived from the ragged appearance of the original returns ; then by a shifting of meaning (parallel to that which occurred in the case of the term "assize," vol. i 275-276) it was applied first to the pleas instituted on these returns, and then to the statute which assigned justices to hear these pleas—hence "the statute called Rageman."

[8] Statutes (R.C.) i 69.

[9] Ibid i 101 ; its authenticity was doubtful ; in Y.B. 19 Ed. III. (R.S.), 292 *Willoughby*, J., said, "the prelates made it themselves ;" vol. i 585.

[10] Statutes (R.C.) i 109. [11] Ibid i 145, 147.

As I have said, the provisions of most of these statutes retain their importance throughout the Middle Ages, and some have retained it even to our own days. From the point of view of the external history of the law, their significance lies in the fact that they had for the most part a parliamentary sanction. These laws enacted by Parliament were the first fruits of the constitutional settlement effected by Edward I.; and just as the existence of Parliament determined the lines upon which mediæval constitutional history was developed, so it determined the lines upon which legal history was developed. What these statutes do for the rules of law the rise of Parliament does for the organs and sources of the law. Just as we must date the final expression of many of our most fundamental rules of law from a statute of Edward I.'s reign, so we must date the final ascertainment of some of the most characteristic features of our law from the appearance of Parliament as a settled body possessed of certain powers, which tend to grow rapidly more extensive and more definite. We shall see this clearly if we look at the effects upon legal development of (1) the settlement of the constitution of Parliament, and (2) the rise of Parliament's legislative powers.

(1) The effects of the settlement of the constitution of Parliament.

In the Parliaments of Edward I.'s reign we see the great tenants in chief summoned by special writ, and gradually forming the House of Lords;[1] and, as a result of this process, we see the peculiarly English conception of the peerage gradually emerging.[2] We see, too, representatives of the other estates of the realm—the smaller landowners, the towns, and the clergy. We have seen that all these persons meet the king and his Council in a Parliament; that the Council is the "core and essence" of this Parliament; and that the term "Parliament" means rather a colloquy than a defined body of persons.[3] These assemblies of estates which meet the king and his Council in a Parliament are analogous to similar assemblies of estates which were summoned both in France and Spain at this period.[4] But we can see the germ of a difference between these English Parliaments and the continental assemblies in the different grouping of some of these estates; and this difference in grouping is largely due to the existence in England of a law which was more common than any law existing in any continental state of this period.

[1] Vol. i 356-357. [2] Ibid 357-358. [3] Ibid 352-353.
[4] Bk. iv Pt. I. c. 1; see Pollard, Evolution of Parliament 51-60 for an account of the relation of the estates to the Council in Edward I.'s reign; for the evolution of these meetings of the estates with the Council into a separate institution—the Parliament, see below 429-434.

Abroad the tenant by knight service would have been as noble as the baron, while the free socage tenant would have been a *roturier*. The English peerage is not the noblesse of the Continent, nor is the freeholder the equivalent of the *roturier*. The common law has levelled the status of the freeholder. But this is not all. In the mediæval state there were two classes which stood apart from the rest of the community—the class of ecclesiastics and the class of burghers. Both had interests distinct from those of the rest of the community, distinct courts, and a distinct law.[1] Edward wished to see both these classes represented in his Parliament.[2] But whereas the ecclesiastics declined to send elected representatives to Parliament, the burghers accepted his invitation and eventually became an integral part of the House of Commons. The constitutional results of this episode have often been noticed. From the point of view of legal history it shows us that our law is becoming, and will become, a very common law. In this country the law of the boroughs is not so separate from the common law as the law of the church. We have seen that the history of the ecclesiastical courts and the borough courts illustrate this fact;[3] and we shall see that the history of the ecclesiastical law and the borough customs afford an even more striking illustration. While the law of the church remains apart from the common law, the law of the boroughs tends to approximate more closely to it. Clearly we cannot disconnect this phenomenon from the inclusion of the burghers in a national Parliament. That inclusion had, in fact, important effects both in legal and in economic history. It tended to bring some, at any rate, of the activities of the boroughs and their inhabitants under the purview of the common law, and it made it possible for Edward I. and his successors to pursue "a definite policy for the development of national resources and for establishing satisfactory relations with foreign places"[4] by the ordinary legislative machinery of the state. Thus the position

[1] Vol. i 526, 580 seqq.; Stubbs, C.H. ii 208-210.
[2] Ibid 139, 140.
[3] Vol. i 141-151, 598 seqq.
[4] Cunningham, Growth of English Industry and Commerce i 265; ibid 264, 265, the contrast between England and other countries, where this course was not followed, is well noted—"That there should be similar laws, similar customs, similar taxes, similar conditions of business throughout the length and breadth of the land, was a very great gain for purposes of inland trade; as all Englishmen came to be subject to one law . . . they were freed from the fetters that local immunities had imposed on their intercourse. In some other countries the special and local restrictions and privileges were swept away, not without blood, and the continuity with the past was rudely broken. . . . In our own land . . . local regulations were succeeded by general legislation, and then general legislation ceased to play such an important part, as world-wide commerce outgrew the control of national ordinances;" cp. Tout, Edward II. 240 for the large part which London and Bristol took in the politics of Edward II.'s reign.

which the ecclesiastics and the burghers take with respect to parliamentary representation foreshadows the position which the systems of law governing them will take with regard to the common law. Something must here be said of that position, in order that we may appreciate the sphere occupied by the common law during the remainder of the mediæval period. I shall deal firstly with the ecclesiastical law, and secondly with the boroughs and their law.

(i) *The Ecclesiastical Law.*

We have seen that the sphere of ecclesiastical jurisdiction in England was wide—wider in some respects than the sphere allotted to this jurisdiction in other European countries;[1] and that within that sphere the law administered was the canon law of the Western church.[2] The separation between the lay and the ecclesiastical jurisdiction had been marked since the Conquest; and it had tended to grow with the growth of ecclesiastical claims, and with the development of the system of the canon law. Though there had been conflicts in Henry I. and Henry II.'s reigns,[3] the separation had been partially bridged by the fact that the king's judges were usually in orders [4] and by the fact that since the days of Magna Carta the clergy had stood with the baronage to secure some measure of constitutional government. These links tended to disappear in Edward I.'s reign. The lawyers were becoming laymen learned only or chiefly in the common law.[5] Ecclesiastics, under the influence of popes like Boniface VIII., [6] were putting first the interests of their order. Archbishop Winchelsey, at the time of the confirmation of the charters, fought chiefly for the interests of the church, and not, like Archbishop Langton in 1215, chiefly for the liberties of England.[7] It was necessary to state solemnly in a statute in 1315 that "such things as be thought necessary for the king and the commonwealth ought not to be said to be prejudicial to the liberty of the church." [8] This shows us that the ecclesiastical law was rapidly becoming more and more separate from the common law; and that, in consequence, the friction between the lay and the ecclesiastical jurisdictions was becoming more acute. The royal judges were apt to be sarcastic at the expense of the ec-

[1] Vol. i 614-632.
[2] Ibid 582-587.
[3] Ibid 584, 615.
[4] Above 227.
[5] Above 229-230; below 318.
[6] His bull *Clericis Laicos* (1296) forbade the clergy to pay any tax whatever to the state from the revenues of the church, Stubbs, C.H. ii 140, 141.
[7] See Stubbs, Sel. Ch. 487-493 for a summary of the events leading to the confirmation of the charters.
[8] 9 Edward II. c. 8; cp. Pollard, Evolution of Parliament 210.

clesiastics if they caught them out in sharp practices;[1] and they were very ready to prevent them taking any advantage from the forms of procedure adopted in their courts.[2] They refused, for instance, to give effect to an excommunication which was obviously designed to prevent a plaintiff from proceeding with his action for a prohibition.[3] The royal courts prohibited the ecclesiastical courts if they ventured to interfere with questions relating to land, to contract, and (subject to the exception created by benefit of clergy[4]) to serious crime. "Within these twenty years," said Bereford, J., in 1303,[5] "people have been accustomed to take bonds binding debtors to submit to the decision of holy church in mercantile matters, and by these obligations they used to draw to the church pleas of debt, to be pleaded before them; and it was seen that that was against law, and it was ordained that they should no longer intermiddle with those kinds of pleas." The ecclesiastical courts were persistent. As late as 1460 all the judges in the Exchequer Chamber found it necessary to restate formally the rule that *læsio fidei* could not be made the means to give these courts a general jurisdiction over contracts.[6]

Thus the ecclesiastical law and the common law go their separate ways. We can no longer expect to find royal judges who can show an accurate knowledge of papal legislation; nor

[1] "The men of Holy Church have a wonderful way! If they get a foot on to a man's land, they will have their whole body there. For the love of God the bishop is a shrewd fellow! And this is the deed of his predecessors, who received other tenements for this released quit claim," Y.B. 3, 4 Ed. II. (S.S.) 69 *per* Bereford, C.J.

[2] "You as judges can enquire divers matters of your office; and therefore a man may be entangled before you at your own suit, and at that of no other person," Y.B. 4 Ed. II. (S.S.) 98 *per* Bereford, C.J.

[3] Y.B. 5 Ed. II. (S.S.) 237.

[4] Vol. i 615-616; vol. iii 293-302.

[5] Y.B. 30, 31 Ed. I. (R.S.) 492; cp. R.P. i 219, 220 (35 Ed. I.) for a long petition against ecclesiastical encroachments; ibid ii 368 (51 Ed. III. no. 46) a petition that the commons be not bound by any ordinance made on the petition of the clergy only or by ecclesiastical constitutions made by the clergy only; ibid ii. 319 (47 Ed. III. no. 32) complaint was made of the cognizance by these courts of pleas of debt, and pleas as to labourers under the Statutes of Labourers, under the guise of a right to interfere in all cases of *læsio fidei;* ibid ii 368 (51 Ed. III. no. 40) the commons contended that the priest's contract was a lay contract, which, however, the courts denied, Putnam, Wage Laws for Priests, Am. Hist. Rev. xxi 28-29; cp. R.P. iv 121 (7 Hy. V. no. 19); but in Y.B. 20 Ed. III. (R.S.) 70 *Willoughby*, J., had laid it down that a contract made by deed is always a "lay contract."

[6] Y.B. 38 Hy. VI. Pasch. pl. 11, "Nota que Fortescue en l'Exchequer Chambre devant touts les Justices d'un Bank et de l'autre disoit que si un home s'affie qu'il paiera un auter xls. a certein jour, a quel jour il ne paie pas, si le party luy sue en Court Christien pro læsione fidei que il aura Prohibition . . . et meme la Ley si un s'affie a faire un feoffement par tiel jour, a quel jour il n'ad pas fait le feoffement, s'il soit sue en Court Christien pro læsione fidei il aura Prohibition causa qua supra;" it seems to have been recognized in Y.B. 8 Ed. IV. Pasch. pl. 11 that the ecclesiastical courts could only take cognizance of *læsio fidei* if the matter fell within their jurisdiction, though a wider jurisdiction was claimed for the court of Chancery; cp. Ramsey Cart. ii no. 289 (1481) for an attempt by the ecclesiastical court to deal with a case of trespass to land; H.L.R. vi 403, Sir F. Pollock cites some precedents from Hale which show the long continuance of these ecclesiastical claims; above 266.

will ideas drawn from canonical jurisprudence be used to develop our law. On the contrary, it is coming to be a rival—almost a hostile system.[1] Even in Edward I.'s reign we can see some signs of isolation.[2] With the growth of national indignation at papal interference and especially at papal taxation, with the connivance of the king, the nobility, and the beneficed clergy at the evasion of statutes passed to put an end to that interference and that taxation, and with the consequent corruption of a church the leaders of which thought only of temporal gain,[3] that isolation will so increase that in the end the ecclesiastical body and the ecclesiastical law will be left an easy prey to a despotic king. At the end of the fourteenth century these things were foreseen in Piers Plowman's Vision.[4]

(ii) *The Borough Customs.*

We have seen that the boroughs were connected in many ways with the counties of which they formed an integral part; that, like other franchise holders, they were strictly controlled by the common law courts; and that, in consequence, their representatives naturally took their places beside the representatives of the counties in a national parliament.[5] The borough courts have a history not wholly dissimilar to the courts of other franchise holders; the borough customs were from the first brought into close connection with the common law; and so these borough customs naturally tended to approximate more or less closely to, and finally to be absorbed into the common law.[6]

[1] When the commons were complaining of the chancellor's jurisdiction in 1416, they said that the procedure of his court is, "according to the form of the law civil and the law of holy church, in subversion of the common law," R.P. iv 84 (3 Hy. V. no. 46).

[2] In 1299, Edward I., remonstrating against a papal provision which infringed the royal rights of patronage, said, "Even if the king should submit or permit it to pass, the magnates of his realm, who are bound by homage and fealty to defend his dignity and his crown, would not allow his right thus to perish," Select Cases before the Council (S.S.) lx.

[3] Adam of Murimuth (R.S.) 175, 176, "Divitiæ quæ ad sedem apostolicam et alienigenas de Anglia transferunter ærarium regis Angliæ annuum et consuetum excedunt, ex quibus etiam divitiis inimici regis Angliæ pro magna parte ut creditur sustentantur. . . . Unde inter curiales sedis apostolicæ vertitur in proverbium quod Anglii sunt boni asini omnia onera eis imposita et intolerabilia supportantes. Contra quæ per prelatos et episcopos non potest remedium ordinari quia, cum ipsi quasi omnes per sedem apostolicam sunt promoti, non audent sonare verbum per quod posset sedes offendi. Rex etiam et nobiles, si ordinaverint aut statuerint remedium contra inconvenientia supradicta, ipsi tamen, per literas et preces pro familiaribus indignis effusas, procurant contrarium impudenter"—Adam had seen things at the centre of ecclesiastical affairs; cp. L.Q.R. xxxviii 300-301.

[4] Langland's Works (ed. Skeat) i 129, C Passus vi :—

> "For the Abbot of England and the Abbess his niece
> Shall have a knock on their crowns, and incurable the wound;
> When that king come, as chronicles me told,
> Clerks and Holy Church shall be clothed new."

[5] Vol. i 138-141.

[6] Ibid 141-151; below 389 392.

We have seen that this approximation took place even in the case of those borough customs which formed part of the rules of the law merchant, in so far as those rules regulated the domestic trade of the country;[1] but that it was otherwise with those rules of the law merchant which applied to foreign transactions, and with the rules of maritime law, which, as we have seen, were intimately related to this branch of the law merchant.[2] These branches of law fell outside the scope of the common law. Just as the borough court could not entertain cases which concerned persons or matters outside the scope of its territorial jurisdiction,[3] so the courts of common law, after a little hesitation, declined to deal with events which had happened or transactions which had been entered into abroad.[4] Such matters were not for the ordinary courts. They were matters for the government, and fell therefore to the king and council, and, in later days, to the council and the court of Admiralty.[5]

In these two branches of jurisdiction, therefore, ecclesiastical and commercial, we can see the rise of two distinct limitations upon the sphere of the common law. The first of these limitations is foreshadowed by the refusal of the ecclesiastics to take part in Parliament. The second is, as we shall now see, connected more closely with the rise of the legislative power of Parliament, and its effects upon the relations of the common law courts and the common law to the executive and legislative powers in the state.

(2) The effects of the rise of Parliament's legislative power.

Both the Great Charter and Bracton's Treatise had made it clear that the council of the nation should be consulted as to the passing of laws.[6] This need for consultation had been a vague restraint upon the crown in former days, because the manner and form in which the nation should be consulted was uncertain. The line between legislative and administrative acts was not

[1] Vol. i 537-538. [2] Ibid 543-544. [3] Ibid 149.

[4] Y.BB. 1, 2 Ed. II. (S.S.) 110, 111; 12, 13 Ed. III. (R.S.) 364, 366; 21 Ed. IV. Pasch. p. 10 pl. 23 *per* Brian; cp. Y.B. 32, 33 Ed. I. (R.S.) 70, 72, where, in spite of the protest of counsel, the court heard an action on a deed executed abroad—but it was an agreement relating to land in England; in 1314-1315 a writ of trespass was ordered to issue against certain trespassers when they came to England in respect of acts done abroad—but this was by order of Parliament, R.P. i 312 (8 Ed. II. no. 96); for the way in which this restrictive rule was modified in the fifteenth and sixteenth centuries see Bk. iv Pt. I. c. 3.

[5] We may perhaps see a hint of the coming separation in the following entry on the Parlt. Rolls (i 126) consequent on a case tried in Parliament in 1293 for breach of contract to carry wine—" Ideo recordum istum traditum est Stephano de Penecestre et magistro J. de Lacy, Justiciariis per Dominum Regem ad omnimodas querelas consimiles de depredationibus nuper in mari factis audiendas et terminandas assignatis;" cp. ibid 137; for other early references to the council see E.H.R. xxxvii 247 and n. 5.

[6] Above 219-220.

clearly drawn. The distinction was growing clearer in Henry III.'s reign.[1] But it is the growth of the legislative power of Parliament which gradually draws a distinct line between the two things. Statutes passed in Parliament cannot be repealed without its consent, as Edward I. reminded the clergy, when, in 1294 they asked him to repeal Statute of Mortmain in return for a money grant.[2] As yet, indeed, the king's council in Parliament, assisted by the judges, is the "core and essence" of the Parliament;[3] and the king's council in Parliament is the body which makes the laws. The consent of the commons is not indispensable.[4] The chief justices still have, as members of the council, a real voice in the making of laws;[5] and the king and his justices might, after the statute had been made, put an authoritative interpretation upon it.[6] In fact, the legislative, executive and judicial authorities have not as yet become so completely separated that they cannot on occasion work together.[7] In 1312 Bereford, C.J., directed the parties to an action in which the circumstances were unusual to "sue a bill to the Parliament;" and after a debate in Parliament judgment was given for the plaintiff.[8] In 1312-1313 the same judge offered to help a plaintiff to get a writ from the Chancery which would fit his

[1] For the clause of the Provisions of Oxford that the chancellor seal no writs save writs of course without the consent of king and council, see vol. i 398; cp. the "Articuli pro quibus episcopi Angliæ fuerunt pugnaturi" (1257), Mat. Par. Chron. Mag. (R.S.) vi 353, 363, "Item in cancellaria Domini Regis nova brevia juri ecclesiastico legi terræ et consuetudini contraria passim fiunt sine consilio regni, principum, et prælatorum assensu; quod fieri non debet;" and see Y.B. 21, 22 Ed. I. (R.S.) 528, below 335, for a clear statement by counsel of this view.

[2] Stubbs, C.H. ii 137; cp. Y.B. 21, 22 Ed. I. (R.S.) 524—where a deliberate departure from a statute is noted by the reporter.

[3] Vol. i 353.

[4] Stubbs, C.H. ii 268, 269; Stubbs thinks that the statute Quia Emptores "was not improbably the last case in which the assent of the Commons was taken for granted in legislation;" but this is very doubtful; the statute de Bigamis (4 Edward I. St. 3) was made by bishops and others of the council, and accepted as a statute because the council "as well justices as others" assented, Reeves, H.E.L. ii 53; and cp. Pollard, Evolution of Parliament 241-242.

[5] Y.B. 33-35 Ed. I. (R.S.) 83—a case of the year 1305 which turned on the Stat. West. II. Hengham, C.J., said to counsel, "Ne glosez point le statut; nous le savons meinz de vous, quar nous le feimes;" ibid 584 Brabazon, J., said he would advise with his companions as to the meaning of 34 Edward I. St. 1, as they were at the making of it; cp. also Y.B. 32, 33 Ed. I. (R.S.) 429; we can perhaps see a survival of these ideas in the protest made by the chancellor treasurer and some of the judges against the statute 15 Edward III. St. 1 because they were not present at its making, R.P. ii 131, 15 Ed. III. no. 42; cp. Select Cases before the Council (S.S.) xx, xxi.

[6] See an Exposition of the Statute of Gloucester, Statutes (R.C.) i 50.

[7] R.P. i 183 (33 Ed. I.), "Ita responsum est ad duas petitiones, Sequantur coram Rogero le Brabanzon et sociis suis, et illi facient quod justum fuerit, per concilium Thesaurarii et Cancellarii et aliorum de Concilio si necesse fuerit;" ibid 354, on a question of legitimacy judges, civilians, and canonists were called to advise the Parliament.

[8] Y.B. 5 Ed. II. (S.S.) 83.

case.[1] When, in the following century, Parliament has become a body distinct from and even antagonistic to the council, the difference between legislative and administrative action will grow clearer. It will only be enactments passed by the Parliament that the common law courts will allow to be laws. It will therefore be only by direct parliamentary action that the law can be changed. It will no longer be able to be rapidly expanded by administrative acts. The discretionary powers of the crown will have ceased to be exercised through the common law courts.

The separation between legislature and executive does not mean that the crown ceased to possess discretionary powers. The intervals between Parliaments, the generality of the older statutes, the growing fixity of the jurisdiction of the common law courts, made the existence of some such powers a necessity.[2] In Edward I.'s reign they were, as we have seen, often exercised by the king's council in Parliament;[3] and in Edward II.'s reign, as Professor Tout says, "administrative matters were appropriately dealt with by ordinance."[4] But this supreme court tends to split into two bodies—Parliament the legislative, and the council the executive body; and this will tend to differentiate more sharply the sphere of statute from the sphere of ordinance.[5] The position of Parliament as the maker of laws strengthened its connection with the common law courts which enforced those laws, and weakened its connection with the crown and council, whose activities it was constantly endeavouring to control. It is for this reason that Parliament tends to assume its common law jurisdiction in error, while with the council remain the discretionary powers which are still left to the crown.[6] The form in which cases calling for the exercise of these powers were at this period brought before the Parliament is very similar to the form in which they were brought in later days before the council and the chancellor;[7] and even in Edward I.'s reign the council sometimes remains after Parliament has been dismissed to deal with such cases.[8]

This abandonment to the council of the discretionary powers of the crown will involve two further limitations upon the sphere of the common law. In the first place, jurisdiction over foreign trade, which was closely connected with foreign affairs, will cease

[1] Y.B. 6 Ed. II. (S.S.) 97; cp. Select Cases before the Council (S.S.) xviii.
[2] Hallam, Middle Ages iii 60; Maine, Early Law and Custom 164.
[3] Vol. i 354.
[4] The Place of Edward II. in English History 158.
[5] Below 436-440.
[6] Vol. i 360-362.
[7] R.P. i 5 no. 17; 157 no. 17; 274 no. 7; 419 no. 12; Parlt. Roll 1305 (R.S.) 25, 109.
[8] Vol. i 354.

to be a matter for the common law courts.[1] It was a jurisdiction for the exercise of which both then and later they were badly equipped; for the problems to which it gave rise could not be solved by its favourite instrument, a jury of the neighbourhood. In the second place, jurisdiction over matters civil and criminal which involved the exercise of equitable or extraordinary powers will likewise be abandoned. Thus many cases which in the twelfth century might have been dealt with on equitable principles by the courts of law, which in the thirteenth century were brought before the king's council in Parliament, will tend to come direct to the council. Equity will still be needed both in civil and criminal cases; but it will gradually cease to be administered through the forms and by the courts of law.[2]

Thus we can see that the sphere of the common law is tending to become limited; the term "common law" will soon cease to mean the law which is administered by all the royal tribunals. We shall soon be obliged to use the term in a much narrower sense to mean the law which is administered by the common law courts and the various local courts closely connected with and controlled by them. Outside the law so administered stands the law administered by the ecclesiastical courts, and the miscellaneous jurisdictions exercised on various grounds by the council. The common law will have abandoned large tracts of law which, as we shall see, will develop with the expansion of the state. And, thus narrowing its scope, it will lose much of its elasticity. It will still, however, enlarge its borders in some few directions. By the end of the mediæval period it will have absorbed the greater part of the jurisdiction of the communal and the manorial courts. Its rules will, for the most part, have prevailed over the borough customs, and it will regulate the smaller domestic mercantile transactions. It will still further have encroached upon the jurisdiction of the ecclesiastical courts. But it will have abandoned jurisdiction over maritime law and over foreign trade. It will have ceased to be able to do equity; and the rigidity of its principles will produce a dislike to new rules, and in some cases an incapacity to modify the old rules in such a way that they can regulate the more complex needs of a new order of society.

The full effect of these limitations is not apparent in Edward I.'s reign; but we can see the beginnings of the limitations themselves. For the present, what is apparent is the fact that the common law has attained a commanding position within the

[1] Select Cases before the Council (S.S.) xxviii, and cases there cited.
[2] Below 334-347.

state.[1] It can control both the local courts and the ecclesiastical courts. Its independence of the king will increase with the increase of the powers of Parliament. It can be changed by an Act of the Parliament alone.[2] In Parliament alone can the decisions of its courts be pronounced to be erroneous. Its alliance with Parliament, therefore, is close; and during the whole of the mediæval period the strength of Parliament will afford an ample security that the position which it has attained will not be seriously threatened. We shall see that the existence of this alliance was destined to have large effects upon the development of the powers of Parliament, and consequently upon the whole future development of the public law of the English state.

The new and independent position thus taken by the common law is partly the cause and partly the effect of many changes in the law and its administration. We can see the growth of a legal profession from the ranks of which the bench tends to be exclusively recruited. We can see, in consequence, many material changes in the sources and character of the law.

In Edward I.'s reign a legal profession is being formed, and it already consists of the two branches of attorneys, and pleaders (*narratores* or *counteurs* or *serjeant-counteurs*). Lord Brougham, in *The Serjeants' Case*,[3] thus distinguishes the two branches. "If you appear," he says, "by attorney, he represents you, but when you have the assistance of an advocate you are present, and he supports your cause by his learning, ingenuity and zeal. Appearance by attorney is one thing, but admitting advocates to plead the cause of another is a totally different proceeding."[4] This distinction, drawn in the nineteenth century, is clearly shown upon the records of the courts all through our legal history.[5] The appointment of an attorney is an unusual and a solemn thing, only to be allowed on special grounds and with the proper formalities.[6] The appointment of a pleader is no such formal proceeding. The idea that one man can stand in the place of another does not come naturally to primitive systems of law;[7]

[1] Persons should sue at common law where possible, R.P. i 34 no. 27; it is only cases in which the law is really doubtful that should be brought before Parliament, see e.g. R.P. i 66, 67 no. 1; cp. Y.B. 2, 3 Ed. II. (S.S.) 52.

[2] See a strong statement to this effect by Belknap and Candish, J.J., in 49 Ass. pl. 8.

[3] This was a case in which the exclusive privilege of the serjeants (below 485-492) to appear at the bar of the Common Pleas was argued before the Privy Council in 1839. It is reported with many learned notes by Manning in his *Serviens ad Legem*.

[4] At p. 125.

[5] See, for instance, any of Plowden's reports in which the record is set out at large. The parties appear by attorney and counsel argue the case.

[6] P. and M. i 190, 191.

[7] See Greenidge, Legal Procedure in Cicero's Time, for a somewhat analogous distinction between the cognitor and the patronus; the cognitor represents his

and it was only gradually that an attorney was allowed to take the place of his client for all purposes.[1] On the other hand, the idea that one man can assist another in legal proceedings is in harmony with many old ideas concerning law and lawsuits.[2] By the end of the thirteenth century this distinction had led to the rise of two distinct classes in the legal profession—the narratores or pleaders, who became the serjeants[3] of the following period, and the attornies.[4]

I shall therefore divide the legal profession into these two classes, and say something, first of the class of pleaders, and secondly, of the class of attorneys.

The Pleaders.

Whether or not there was ever a period at which a man was not allowed the assistance of his friends when pleading before a court it is difficult to say. Certainly he was allowed such assistance as early as the laws of Henry I., unless he was charged with felony.[5] In those days one of the chief advantages of having a pleader to speak for one before the court lay in the fact that it was possible to disavow a mistake made by the pleader, and so avoid losing the action by a verbal slip.[6] The man who employs a pleader has two chances of escaping error. The man who does not has only one chance. We see traces of this idea in the thirteenth century in the custom observed both in the king's courts and in the local courts of asking a litigant whether he will abide by his pleader's statement.[7]

client for all purposes; the patronus does not—he is only an able interpreter, intervening for the purpose of illustrating the law and marshalling the proofs in his client's interests.

[1] That in earlier days even the attorney did not completely represent his client is shown by the fact that he could not disclaim or make admissions binding on his client, Eyre of Kent (S.S.) ii 120 *per* Spigurnel, J.

[2] E.g. both the secta and the compurgators involve the idea of assistance.

[3] Below 485-492.

[4] "A study of the rolls makes it plain that it was not normal for those men who had become serjeants to act as attorneys, though here and there in a particular action an exception may perhaps be noticed," Y.B. 3, 4 Ed. II. (S.S.) xvii.

[5] Leg. Henr. 47, 48; above 107; this particular limitation lasted till 1836 (6, 7 William IV. c. 114), though in the eighteenth century counsel had been allowed to cross-examine the witnesses for the prosecution; see Thayer, Evidence 161 n.

[6] P. and M. i 191; Leg. Henr. 46. 3, "Bonum autem est, ut cum alicujus consilium in placito redditur, cum emendacione dicendum predicatur, ut si forte perorator, vel supra adjecerit aliquid, vel omiserit, emendare liceat ei. Sepe enim fit, ut in sua causa quis minus videat quam in alterius, et in ore alterius plerumque poterit emendari, quod in suo non liceret;" Bracton's Note Book case 131, "Deadvocat quod narrator suus pro eo narravit." The result is in such cases that the pleader is amerced, case 298, "Postea deadvocavit Willelmus narracionem Johannis de Planez advocati sui, et ideo inde Johannes in misericordia." Y.BB. 3 Ed. II. (S.S.) 129; 12, 13 Ed. III. (R.S.) 144. Cp. Laws of the Commune of Oleron, Black Book of the Admiralty (R.S.) ii 317.

[7] Y.BB. 33-35 Ed. I. (R.S.) 458; 30, 31 Ed. I. (R.S.) 273; the Court Baron (S.S.) 41, "Sir, do thou ask whether Walter will avow what his pleader hath said on his behalf." Cp. La Grande Coutumier of Normandy (ed. De Gruchy) c. 64 for analogous rules.

Probably in any important case pleaders will be employed. Anesty, in his journeys over the country in pursuit of the king's court, employed many, including Glanvil.[1] In the early years of the thirteenth century there were many who made a profession of the civil and canon law; and at a time when there was much litigation in the king's courts, and when the relations between the civil and canon law on the one side and the common law on the other were close,[2] it is probable that there were many who practised both in the ecclesiastical and in the common law courts. We have seen that William of Drogheda's book would lead one to believe that this was the case.[3] No doubt many of these practitioners were in orders. But we have seen that the clergy were being discouraged in the thirteenth century from taking part in any way in the administration of lay jurisdiction. The fifth Lateran Council prohibited the clergy from appearing as advocates in the secular courts unless in causes in which they themselves were concerned, or in the causes of the poor.[4] In 1237 the constitutions of Cardinal Otho regulated the advocates in the ecclesiastical courts;[5] and these constitutions, as Maitland points out, may have formed a model for the regulation of the pleaders in the king's courts.[6] These pleaders are referred to in 1235;[7] and from the last half of the thirteenth century there are many evidences of their existence. In 1253 a man who appeared for another was amerced because he was not an advocate.[8] In 1268 one Robert de Coleville, pleader of the bench, assaulted a justice of the Jews in Westminster Hall; and it was only "ad instantiam sociorum suorum narratorum" that his offence was pardoned.[9] We have frequent mention of narratores pro rege.[10] The exemption of pleaders from the law as to maintenance, when they were appearing for their clients, is evidence of the growth of a professional class;[11] and in our earliest Year Books "we see that already the great litigation of the realm . . . is conducted by a

[1] P. and M. i 192, 193. [2] Above 227-229. [3] Above 283.

[4] "Nec advocati sint clerici vel sacerdotes in foro sæculari, nisi vel proprias causas vel miserabilium personarum prosequantur," cited Pulling, Order of the Coif 11 n. 1; cp. Y.B. 3, 4 Ed. II. (S.S.) xvi.

[5] Mat. Par. Chron. Maj. (R.S.) iii 439, 440.

[6] P. and M. i 194.

[7] Mat. Par. Chron. Maj. (R.S.) iii 614, "Licet rex cum omnibus prolocutoribus banci quos narratores vulgariter appelamus in contrarium niteretur," cited P. and M. i 193, 194.

[8] Plac. Abbrev. 137—but Maitland suggests that it is not quite clear that the cause of amercement was the fact that the person was not a member of the legal profession.

[9] Manning, Serviens ad Legem 279; we cannot construct a complete list of these narratores till the end of the century, Y.B. 3, 4 Ed. II. xv.

[10] P. and M. i 194; Pulling, Order of the Coif 40, 41; R.P. i 7, no. 31.

[11] Manning, Serviens ad Legem 170, 280, citing Coram Rege roll 25 Ed. I. Rot. 22; Plac. Abbrev. 295b; 28 Edward I. St. 3 c. 11; cp, 3 Edward I. c. 29, which punishes deceits committed by serjeant-pleaders.

small group of men. Louther, Spigurnel, Howard, Hertpol, King, Huntingdon, Heyham—one of them will be engaged in almost every case."[1] They sit in court, and one will sometimes intervene as "amicus curiæ."[2] The reporters mention their opinions with almost as much respect as the opinions of the judges.[3] In one case it is noted that the loss of a good serjeant has caused the loss of the case.[4] Parliament, too, refers difficult points of law to them as well as to the judges.[5] Nor did these pleaders confine their activities to the royal courts. In 1275 William Bolton and other pleaders were practising in the court of the fair of St. Ives.[6] Lords of manors found it necessary to prohibit their appearance in their courts.[7] In 1280 the city of London made regulations for the admission of both pleaders and attorneys to practise before the civic courts, and for their due control.[8]

It is probable from a tale told by Matthew of Paris that these pleaders had already begun to adopt the distinctive dress of the serjeants at law—the coif.[9] It is not probable, however, that the class of serjeants at law were as yet distinct from the other pleaders. The term "serjeant" or "serjeanty" is a common term to express service of very various kinds.[10] We read of "serjeant counters;"[11] but the word "serjeant" seems to be used as an adjective to mean a working or practising barrister. However that may be, the formation of such a class is not far off.[12] What the city of London could do for the regulation of those who practised in the civic courts could be done for the royal courts either by professional opinion or by royal action; and the need for such action is shown by the complaints made against pleaders and attorneys in the Eyres of 1292 and 1293.[13] In 1292[14] the

[1] P. and M. i 195.

[2] Y.BB. 21, 22 Ed. I. (R.S.) 148; 33-35 Ed. I. (R.S.) 476.

[3] Y.BB. 21, 22 Ed. I. (R.S.) 218, 276; 30, 31 Ed. I. (R.S.) 106; 3, 4 Ed. II. (S.S.) 201; in Y.B. 21, 22 Ed. I. (R.S.) 446 the opinion of the apprentices is mentioned.

[4] Y.B. 30, 31 Ed. I. (R.S.) 172. [5] R.P. i 67.

[6] Select Pleas in Manorial Courts (S.S.) 155, 159.

[7] Ramsey Cart. (R.S.) i 428 (1240), "Prohibitum fuit per dominum Radulphum Abbatem sub pœna viginti solidorum ne aliquis tenentium suorum ducat placitatores in curiam ad impediendum vel prorogandum justitiam Abbatis vel suorum;" Gesta Abbatum (R.S.) i 453.

[8] Mun. Gild. (R.S.) ii pt. i 280.

[9] Mat. Par. Chron. Maj. (R.S.) s.a. 1259, one Bussey, a pleader, "voluit ligamenta coifæ suæ solvere ut patam monstraret se tonsuram habere clericalem sed non est permissus."

[10] Vol. iii 46. [11] E.g. 3 Edward I. c. 29.

[12] See Y.B. 3, 4 Ed. II. (S.S.) xvii.

[13] Allegations of corrupt collusion with the opposite party, Select Bills in Eyre (S.S.) nos. 6 and 88; of purposely pleading a wrong exception in order to lose the action, ibid no. 99; cp. Introd. xlii-xlv.

[14] R.P. i 84, "De attornatis et apprenticiis Dominus Rex injunxit J. de Metingham et sociis suis, quod ipsi, per eorum discretionem provideant et ordinent certum

king directed the judges to provide a certain number of attorneys and apprentices to follow the court, who should have the exclusive right of practising before it.[1] The king considered that one hundred and forty should suffice; but more were to be appointed if there was need. Probably the king did not mean to interfere with the established pleaders. He meant rather that there should be in future some regulation of the "apprenticii"—the learners who intended to follow the profession of the law. It is quite possible that up to this time these "apprenticii" had got their training from the serjeants, or the class of practitioners in the royal courts who answered to the serjeants of later days.[2] It is probable that the immediate effect of this ordinance was the making of more systematic arrangements for their legal education; and it is not unlikely that the judges entrusted those who were responsible for giving this education with the duty of selecting those privileged to practise in the courts.[3] There is an incidental reference to the teaching of law in London in 1293;[4] and shortly after this date we hear of the discussions of the students.[5] In 1305 Hengham, C.J., was puzzled by a knotty case which he suspected had been manufactured by these students in order to ascertain a doubtful point of law.[6] But for the later organization of the system of legal education, and for clear evidence that those entrusted with its management were given the privilege of selecting the persons entitled to practise in the courts, we must wait until the following period.

The Attorneys.

The power to appoint an attorney was a privilege to be conceded by royal grant;[7] the appointment must be strictly proved;[8] and in the royal courts an attorney must be appointed

numerum de quolibet comitatu, de melioribus et dignoribus, et liberius addiscentibus . . . quod curiæ suæ et populo de regno melius valere poterit et majus commodi fuerit; et quod ipsi quos ad hoc elegerint curiam sequantur, et se de negotiis in eadem curia intromittant et alii non. Et videtur Regi et ejus concilio quod septies viginti sufficere poterint; apponant tamen præfati justiciarii plures, si viderint esse faciendum. . . . Et de aliis remanentibus fiat per discretionem eorundem justitiariorum."

[1] Possibly friends or relations could still assist, see 28 Edward I. st. 3 c. 11; but cp. Fleta ii 37. In the Eyre it was possible to claim by one's bailiff; and, as in the case of the pleader, an informality could be disavowed, Eyre of Kent (S.S.) iii xxxiii; above 312 n. 6; but a bailiff could not plead an exception in bar of an assize, Y.B. 4 Ed. II (S.S.) 131; cp. Bracton f. 212 b.

[2] Bolland, L.Q.R. xxiv 393-394.

[3] Ibid 395-398.

[4] Bills in Eyre (S.S.) no. 79; Introd. xlv.

[5] See Y.B. 2, 3 Ed. II. (S.S) xv, xvi for the students who discussed cases in "Le Crib," which appears to have been a part of the court set apart for them, see Y.B. 3, 4 Ed. II. (S.S.) xli, xlii.

[6] Y.B. 33, 35 Ed. I. (R.S.) 64, "I tell you that one of these apprentices has made the purchase to find out what judgment we shall give on the writ."

[7] P. and M. i 191.

[8] Manning, Serviens ad Legem 267; Select Pleas in Manorial Courts (S.S.) 59.

by the litigants in court.[1] Glanvil, it is true, does not mention an attorney *eo nomine*;[2] but he has much to say of the *responsalis*. He was a person, who, it would seem, if formally appointed in court, answered to the attorney of later days; and, if informally appointed out of court, answered to the bailiff or responsalis of Bracton's day.[3] The control of the court was naturally closer over the responsalis formally appointed in court; and this control took shape in rules as to his powers and position which came definitely to differentiate him from the mere bailiff.[4] His appointment could only be made by a party to litigation,[5] for the purposes of a particular case in a particular court; and his authority expired on the death of his principal,[6] if his principal intervened,[7] or if judgment had been given.[8] If it was desired to appoint an attorney for any other court, or for more than one particular case, the authority of a special writ must be shown.[9] The law upon this matter has never been directly changed; but the number of statutory exceptions, extending from the reign of Henry III. to the reign of Elizabeth, has practically eaten up the rule;[10] and by the end of this period it was apparently open to

[1] Glanvil xi c. 1, "Oportet eum esse presentem in curia qui alium ita loco suo ponit;" Y.B. 16 Ed. III. (R.S.) ii 126; Reeves, H.E.L. i 217-219; Northumberland Assize Rolls (Surt. Soc.) 300-305, there is a list of the attorneys appointed in court on the roll of 7 Ed. I.; for similar rules in Normandy see La Grande Coutumier c. 65.

[2] Y.B. 6, 7 Ed. II. (S.S.) xi.

[3] Glanvil xi c. 1; Bracton, f. 182; at f. 212b he seems to distinguish between the responsalis and the attorney, assimilating the former to the bailiff; Y.B. 6, 7 Ed. II. (S.S.) xv.

[4] "It was probably by successive rulings of the Justices that the powers of an attorney and a bailiff respectively were differentiated," Y.B. 6, 7 Ed. II. (S.S.) xviii; for some of the disabilities of the bailiff as compared with the attorney see ibid xix; above 315 n. 1.

[5] "Until the Abbot is received he can make no attorney," Y.B. 3, 4 Ed. II. (S.S.) 139 *per* Bereford, C.J.

[6] Y.B. 12, 13 Ed. III. (R.S.) 238.

[7] Eyre of Kent (S.S.) i xxxii; Y.B. 20 Ed. III. (R.S.) 118, 120.

[8] Y.B. 1, 2 Ed. II. (S.S.) 98-99—judgment that law must be waged; he could not even appear on matters arising out of the judgment, e.g. if a writ of scire facias was issued on it, ibid 5; Britton ii 15. 4; Britton, however, points out that these restrictions do not apply to a general attorney.

[9] P. and M. i 192; for the forms of writs see Glanvil xi c. 2; and cp. Select Pleas in Manorial Courts (S.S.) 79 for a form issued after the Statute of Merton; we find such writs in registers of writs of the early thirteenth century, H.L.R. iii 113 (no. 29), 115 (nos. 37, 38); Parlt. Roll 1305 (R.S.) 47, the University of Oxford petitioned for leave to appoint a general attorney and it is allowed to appoint one for three years; in Y.B. 5 Ed. II. (S.S.) 4 an attorney contracts to act during his life, whenever called on, in the Bench, coram rege and wherever else he should be able so to act; a general attorney of this kind (unlike a special attorney) could delegate his functions, Eyre of Kent (S.S.) i xxxii, 27; Y.B. 4 Ed. II. (S.S.) 133; see Y.B. 20, 21 Ed. I. (R.S.) 202, 414 for cases in which an attorney could not be appointed; for some illustrative instances of the appointment of attorneys see Bellot, L.Q.R. xxv 401-404; a person not regularly appointed is a mere "nuncius" who could not act, Bracton's Note Book, case 1188.

[10] The series begins with the Statute of Merton (1235-1236) 20 Henry III. c. 10; cp. 3 Edward I. c. 42; 6 Edward I. c. 8; 13 Edward I. c. 10; for later statutes, Comyn, Digest, *Attorney* B. 5; for a case where a person under arrest was not allowed to make an attorney see Y.B. 12 Rich. II. 5.

anyone to appoint even a general attorney without a special writ.[1] We can see survivals of these old ideas in the rule that an infant not being competent to appoint an attorney must appear by guardian;[2] and in the disability of an idiot to appear by attorney.[3]

It was probably due partly to the control exercised by the court over the attornies formally appointed,[4] and partly to the frequency with which permission was given to appoint attorneys either by writ or by statute, that we get in Edward I.'s reign the rise of a class of professional attorneys.[5] It appears from the Bills in Eyre that they were remunerated by their clients partly in kind and partly in cash,[6] and that they were liable to be sued not only for defrauding their clients, but also for negligence in the conduct of their cases.[7] They were regulated in the city of London by the same ordinance as that which regulated the pleaders. It was provided that no attorney should follow the profession of a pleader; and, as we have seen, the rule was probably the same in the royal courts.[8] The ordinance of 1292 dealt with attorneys as well as with apprentices; and perhaps originated the staffs of professional attornies attached to the three common law courts from amongst whom litigants in those courts must choose their representatives.[9] But, notwithstanding this ordinance, it is probable that the king did not at once abandon his right to issue his writ allowing a person to appoint as his attorney any person named in the writ. Subject, however, to this exception, perhaps those appointed by the judges of the several courts of common law under this order got, like the pleaders, a practical monopoly of representing litigants in the royal courts, and, at this period, of pleading in the same courts.[10] We can see the beginning of

[1] Plumpton Corr. (C.S.) 44 n. b.

[2] Y.B. 3, 4 Ed. II (S.S.) 191; Cotton v. Westcott (1618) Cro. Jac. 441; Comyn, Digest, *Attorney* B. 6; see Simpson v. Jackson (1623) Cro. Jac. 641, for the distinction between the infant's guardian and next friend in relation to litigation.

[3] F.N.B. 27 G; Bl. Comm. iii 25-26. This disability originally applied to one who was deaf and dumb, Y.B. 6, 7 Ed. II. (S.S.) xiv n. 2.

[4] "It seems not unlikely that the whole of the practical details of the system of vicarious appearance were *ab initio* the work of the Justices," Y.B. 6, 7, Ed. II. (S.S.) xvii.

[5] P. and M. i 192.

[6] Bills in Eyre (S.S.) xlvi-xlvii; in Y.B. 5 Ed. II. (S.S.) 1-9 there is a case in which an attorney was engaged to act when required by his employer, in return for an annuity of 20s. a year and a robe; for similar contracts with counsel see below 491.

[7] Bills in Eyre (S.S.) xliv-xlv.

[8] Y.B. 3, 4 Ed. II. (S.S.) xvii; above 314 n. 14.

[9] Bk. iv Pt. I. c. 8.

[10] See Bracton f. 212b; Y.BB. 33-35 Ed. I. (R.S.) 132, 440; 4 Ed. II. (S.S.) 21-23, 132; in Y.B. 11, 12 Ed. III. (R.S.) 436 Sharshulle, J., said, "The same person may be attorney for one man and guardian for another in one præcipe, and the attorney for his one client may claim the entirety and plead one plea, and for his other client he may claim the entirety, and plead another plea;" the old idea of the

the process which will make the attorney for legal business an "officer of the court" which has appointed him, and separate definitely his sphere of action from that of the pleader.

The rise of these professional pleaders and attorneys was not without its influence upon the constitution of the bench. We have seen that at the latter part of Henry III.'s reign there are signs of a tendency to recruit the bench from the bar.[1] It was probably the rise of a distinct legal profession which originated this tendency. With the growth of the profession in Edward I.'s reign it was naturally much emphasized; and it was helped forward by the increasing tendency to appoint laymen as well as clerks in all branches of the civil service.[2] Out of nine serjeants at law of Edward I.'s reign seven were raised to the bench. Out of sixteen "attornati regis" four became judges of one bench or the other, and one became a baron of the Exchequer.[3] It is true that ecclesiastics still attained to the bench. In Edward II.'s reign the proportion of lay to clerical judges in the Common Pleas was ten or eleven laymen to eight or nine clerks; in the King's Bench six laymen to three clerks; and in the Exchequer twelve laymen to thirteen clerks.[4] Hengham, C.J., was a distinguished representative of the older school. At different periods in his career he was chancellor of Exeter Cathedral—a post already adorned by famous lawyers—archdeacon of Worcester, and canon of St. Paul's.[5] But in spite of his ecclesiastical preferments he was first and foremost a lawyer. In a Year Book of Edward II.'s reign a story of impartial justice in the face of royal power is told to his credit;[6] and in a Year Book of Edward III.'s reign it is said, on the authority of Herle, that he drew the statute de donis conditionalibus.[7] We shall see that his writings bear little trace of his ecclesiastical profession.[8]

identity of the attorney with his client appears in Trewith's comment, "That would be for a man to give himself the lie;" for the later rule excluding attorneys from pleading see below 505-506.

[1] Above 229.

[2] Tout, Edward II. 46-47.

[3] Foss, Judges iii 45, 46, 48.

[4] Tout, Edward II. 336, 368, 373; cp. Y.B. 3, 4 Ed. II. (S.S.) xvii-xx.

[5] He was chancellor of Exeter Cathedral 1275-1279; archdeacon of Worcester 1287, 1288; canon of St. Paul's 1280 till his death in 1309; his judicial appointments were many and varied; he was C.J. of the King's Bench in 1270, 1273, 1274-1290; C.J. of the Common Pleas 1272; in 1301 he was again C.J. of the Common Pleas; under Edward II. he was puisne judge of the Common Pleas till his death in 1309, Dict. Nat. Biog.; Foss, Judges iii 261-264. Another example is to be found in the career of Stanton who, at different periods in his career, filled the offices of Chief Justice of both Benches, Chief Baron of the Exchequer, and Chancellor of the Exchequer, Tout, op. cit. 340, 370, 374.

[6] Y.B. 3 Ed. II. (S.S.) 196, 197; for the story see below 546.

[7] Y.B. 15 Ed. III. (R.S.) 392, "He [Herle] said that the strongest argument against us which he knew was that Hengham, who drew the statute, construed it another way;" for Herle's reputation as a lawyer see below 557.

[8] Below 323-325.

They might have been written by one who had made his career at the bar. This is not without its significance. The law has become so distinct a profession that all who follow it will bear a similar intellectual stamp.

The results of the growth of this legal profession can be seen in the changed character of the sources of the law. This will be apparent if we look at the books written by the lawyers of Edward I.'s reign. I shall deal firstly with the books of Britton and Fleta, and secondly with certain short tracts which treat mainly of the rules of procedure and pleading.

The author of the book called Britton[1] may be one John le Breton, who was one of the justices for the county of Norfolk assigned, in 1305 and 1307, to hear complaints as to the non-observance of Magna Carta and the Charter of the Forest; and this John was perhaps the same Sir John le Breton to whom the custody of the city of London was entrusted when, in 1286-1298, it was deprived of its liberties. He may also have been one of the signatories of the royal letter to Boniface VIII. in 1301. Mr. Nichols, however, rather inclines to the belief that he was a royal clerk, from his knowledge of royal officials and matters ecclesiastical.[2] The book should probably be dated about the years 1291-1292. The statute Quia Emptores (1290) is mentioned as a new law; and a statute of 1295 is not mentioned where we should expect to see it.[3] The form of the book is unique. It purports to be a direct enactment and codification of the law by the king. The fact that it was given this form is significant of the age which saw a whole code of law enacted for Wales, and the many comprehensive statutes which settled the main outlines of English law for two centuries. The writer knows little or nothing of Roman law;[4] and his ecclesiastical law is of the sort that would be familiar to a common lawyer. The subject matter is for the most part pure common law. It is a practical book for lawyers practising in the royal courts, written in the law French of the day—"the first great treatise upon our law written in the vernacular language of the courts."[5] The

[1] The Treatise is excellently edited by Nichols; the references are to his edition.

[2] i xxi, xxii. It used to be thought that the author might be John le Breton, Bishop of Hereford, who died in 1275; but if so the book in its present form must be a revision, see Dict. Nat. Biog. and next note.

[3] i xviii; in Henry VI.'s reign *Prisot*, C.J., in Y.B. 35 Hy. VI. Hil. pl. 2 (p. 42) said that Edward I. had caused all the laws to be reduced to writing two years after the Stat. West. I. (1277), and this is probably an allusion to Britton; but this date will not fit the book in its present form, as later statutes are mentioned; the same remark applies to the date 1287 which Selden suggested in his notes on Hengham.

[4] Above 287 n. 4.

[5] i xxviii.

number of early manuscripts which survive shows that it was a popular book; and that it retained its popularity can be seen from the fact that it was one of the first of the older law books to be printed.[1] A Cambridge MS. of the fourteenth century contains a commentary which was probably written by a contemporary of the author.[2]

The author owes much to Bracton, and a little to Fleta's compendium of Bracton. In fact, the main part of his Treatise is an abbreviation of the practical parts of Bracton's Treatise, with the addition of such statutes and legal changes as were needed to bring Bracton's law up to date. Thus in the first book he begins by considering the rights of the crown, the royal courts and officials,[3] and the business of the Eyre.[4] The conduct of the Eyre and the matters there dealt with afford a scheme around which can be grouped criminal law and procedure, the various proprietary and jurisdictional rights of the crown, and the remedies available at the suit of individuals by way of appeal in cases of treason, homicide, robbery, and mayhem, or by way of action of trespass in other cases. He then deals with the jurisdiction of the county court and other courts, in distress, trespass, and debt.[5] In dealing with debt he makes a few general remarks as to obligation which he has taken from Bracton.[6] He also deals shortly with the actions of detinue and account;[7] and finally mentions other personal actions which the sheriff can hear by writ of justicies.[8] He concludes the book with an account of the sheriff's tourn, and of a matter cognate to the business of the tourn—the various weights and measures allowed within the kingdom.[9] The author then passes to the subject of villeinage.[10] The remaining five books deal with the various real actions possessory and proprietary. Around these actions Britton groups at various places the general rules of the law relating to land. Thus the second book upon Novel Disseisin contains, in addition to an account of this action, disquisitions upon the various ways and modes in which property of different kinds can be acquired,[11] upon the nature of a disseisin which gives rise to the assize,[12] upon the limitations upon the right of self-help,[13]

[1] By Redman, probably in 1540, Dict. Nat. Biog.

[2] Nichols thinks that the commentator was John de Longueville, member of Parliament for Northampton in Edward I. and II.'s reigns, judge of assize, oyer and terminer, and gaol delivery of Edward II.'s reign, and, from the character of the notes, a professional lawyer, i xlix, lx-lxiii.

[3] Bk. i cc. 1, 2. [4] Ibid cc. 3-27. [5] Ibid cc. 28, 29.

[6] c. 29 §§ 2-6. [7] c. 29 §§ 34, 37.

[8] c. 29 § 38; vol. i App. VI. [9] Bk. i cc. 30, 31.

[10] Nichols i xxxiv, xxxv. In some MSS. this is the last chap. of Bk. i, in others the first of Bk. ii.

[11] Bk. ii cc. 1-10. [12] Ibid cc. 11, 12. [13] Ibid c. 13.

upon the easements to which the assize was applicable,[1] and upon the position of the termor who has been ejected.[2] The third book, upon Mort d'Ancestor, deals with the nature of tenures and their incidents,[3] and with the law of coparcenary and partition,[4] before describing the assize.[5] At the end of the book the actions of quod permittat, ael, besael, and cosinage are described.[6] The fourth book deals with the various remedies available to recover ecclesiastical property: the assize of darrein presentment,[7] quare impedit, quare non permittat,[8] and the assize utrum.[9] The book concludes with an account of the attaint jury.[10] The fifth book deals with the subject of dower, and the various remedies open to the widow.[11] It concludes with an account of the writ of entry and its relation to the writ of right.[12] The sixth book deals with the writ of right. The account of the procedure upon this writ is prefaced by a summary of the rules of inheritance.[13] The Treatise ends, as Bracton's Treatise ends, in the middle of the account of the procedure on this writ.[14]

We can see from this summary that the work was based on Bracton's Treatise. The arrangement is substantially the arrangement of the largest and the most practical part of Bracton's work. Much of the information contained in the general part of Bracton's book has been worked into the account of the various actions available to litigants. It is found where a practising lawyer would look for it and expect to find it.[15]

The Treatise known as Fleta was also composed by a writer of Edward I.'s reign.[16] His intimate acquaintance with the royal court and the royal officials would lead one to suppose that he held some office in the household.[17] Perhaps he was guilty

[1] Bk. ii cc. 23-32.
[2] Ibid c. 33.
[3] Bk. iii cc. 2-5.
[4] Ibid cc. 7-9.
[5] Ibid cc. 10-24.
[6] Ibid cc. 25, 26. For these actions see vol. iii 20-24 and App. Ia 7, 9.
[7] Bk. iv cc. 1-6; vol. i App. IIIc.
[8] Ibid c. 6; vol. iii App. Ia 11.
[9] Ibid cc. 7, 8; vol. i 276, 329-330, App. II.
[10] Ibid cc. 9-12; vol. i 337-342.
[11] Bk. v cc. 1-13.
[12] Ibid cc. 14-16.
[13] Bk. vi cc. 2, 3.
[14] The tenth chapter is the last in the book, and it ends with an unfinished sentence.
[15] Mr. Nichols i xxx says, "His (Britton's) method of arrangement is not adapted to a philosophical treatment, and, in the true spirit of an English lawyer, he approaches his subject from a practical point of view, fixing his regard upon the remedies to be administered by the legal practitioner, rather than on the rights attributed to his client. In this respect he offers a contrast to Bracton, whose arrangement, borrowed from the Justinian Institutes, is entirely different;" but we have seen that this arrangement is not the arrangement of the greater part of Bracton's Treatise, above 242-243; the greater part is arranged substantially as Britton is arranged.
[16] Selden, Diss. ad Fletam c. x 2.
[17] Bk. ii cc. 13-32, 34-39.

of some defalcations and was committed to the Fleet prison, where he wrote his book.[1] He mentions the Statute of Acton Burnell (1283),[2] and also the Statute of Westminster II. (1285).[3] Proceedings in the court of the king's steward of the years 1286, 1289, and 1290 are mentioned and the rolls are cited.[4] The statute of Quia Emptores (1290) is only indistinctly referred to.[5] Possibly, therefore, the book was written about the year 1290. We have seen that Fleta gives some account of the Parliament, which he regards as the supreme tribunal of the country.[6] He also gives us a little information upon matters agricultural which he has borrowed from Walter of Henley's Treatise.[7] For the most part the six books of the Treatise are based on Bracton. It was never much read. Probably it was superseded by the later work of Britton. Fleta is written in Latin. Britton, we have seen, was written in law French; and both the arrangement and the contents of the later work made it more suitable to the needs of practising lawyers.

We can see from Britton that the law is coming to be more and more a commentary upon writs, and that expositions of it are therefore grouped around the forms of actions. The literary style and the wide legal learning of Bracton partially conceal the fact that this manner of arrangement dominates even his work; while his constant references to actual cases always make his commentary living and suggestive. Britton and Fleta were perhaps royal clerks—that is, they were something more than "mere common lawyers." By borrowing from Bracton they can still write something like a legal Treatise. The later legal writings of the reign, written by practising lawyers, are, as I have said, merely tracts upon the rules of procedure and pleading.

Very many of these tracts were written at the end of the thirteenth century. Some of them were summaries or adaptations from parts of Bracton's Treatise. Thus the *Cadit Assisa* is a summary of his tract on the assize of Mort d'Ancestor, and it follows the original very closely, even citing some of Bracton's cases.[8] Similarly the main part of Hengham's *Magna* is a summary of those parts of the Treatise in which Bracton deals

[1] Britton i xxvi. Selden op. cit. c. x 3 suggests that he may have been one of the judges who were punished by Edward I. in 1289.

[2] ii 64. 1, "Dominus rex *nuper* in Parliamento suo apud Acton Burnel;" Statutes (R.C.) i 53.

[3] Ibid; Statutes (R.C.) i 71.

[4] ii 3-9, 10, 12. We have seen that Fleta's information as to this court is specially detailed, vol. i 207-208.

[5] iii 14. 9, "Inhibetur etiam ne donatores de cætero a mediis servitia sua recipiant, sed a tenentibus;" Statutes (R.C.) i 106.

[6] Vol. i 352.

[7] ii 71-88; P. and M. i 188, 189.

[8] Woodbine, Four Thirteenth Century Law Tracts 1 n. 4.

with the writ of right, essoins, defaults, and warranty.[1] All of them aimed at giving concise information of the kind needed by the practising lawyer; all were useful as text-books to the student;[2] and all, except the *Summa Bastardia*[3]—a short treatise on bastardy—deal with procedure or pleading or both.

I shall divide these tracts into the following three groups: (i) Hengham's two Summæ; (ii) the four tracts printed by Mr. Woodbine—the Fet Asaver, the Judicium Essoniorum, the Cum sit Necessarium or Modus Componendi Brevia, the Exceptiones ad Cassandum Brevia; (iii) the Brevia Placitata and the Casus Placitorum.[4]

(i) Hengham's two tracts are called the *Parva* and the *Magna*, and both are written in Latin. The *Parva* was clearly written after 1285, since there are references to the Statute of Westminster II.[5] The *Magna* was probably written before that date.[6] Both were probably written before 1290, since the author appears not to have heard of the statute Quia Emptores.[7] They both deal with the procedure in certain real actions; and the *Magna*, which is based partly on Glanvil,[8] but chiefly, as we have seen,[9] on Bracton, is probably unfinished.[10] The aim of the author is to give some instruction in the rules of pleading and the procedure to be followed at different stages in the various classes of these actions, together with some account of the relation of the jurisdiction of the county court and the court baron to that of the royal court in such cases.[11] They contain some hints as to the development of the law under Edward I. which are valuable to the historian.[12] That both the *Magna* and the *Parva* were popular works is seen by the fact that they were often

[1] Woodbine, op. cit. 19 and n. 2; it is there pointed out that this work is "the earliest Summa to develop out of the De Legibus," and the earliest recognition of Bracton's work.

[2] Ibid 37 n. 2.

[3] Ibid 1 n. 3; it was written some time in the reign of Edward I.

[4] For some lists of these tracts see Maitland, Collected Papers ii 45; Y.B. 30, 31 Ed. I. (R.S.) xii n. 1.

[5] Parva cc. 1, 4, and especially c. 6, where the estate tail is clearly alluded to.

[6] In c. 1 he gives a precedent of a writ of right taken from Bracton which was obsolete by virtue of c. 1 of the Statute of Westminster II., Selden's note; Mr. Woodbine places it between 1270 and 1275 on the ground that the rules as to process contained in the book are of that period, op. cit. 20 n. 1.

[7] Magna c. 13, dealing with warranty, clearly implies that the donee holds of the donor and not of the capitalis dominus; Parva c. 6, "ut in casu quo feoffator se facit medium inter Capitalem Dominum et feoffatum."

[8] Woodbine, op. cit. 19.

[9] Above 322.

[10] The introduction promises us some information about the "modus Cyrographandi" which is not given.

[11] Magna, Introduction.

[12] Vol. i 59 n. 2; Parva c. 8 perhaps shows us that the bias in favour of the personal freedom of the villein is growing.

copied,[1] and that there was an English translation of them extant probably as early as Edward III.'s reign.[2]

(ii) There is some ground for thinking that two if not three of the four tracts printed by Mr. Woodbine are also from Hengham's pen.[3]

The *Fet Asaver*[4] is a tract on procedure written in French. It was "so popular that it was more often copied than any other piece of legal literature with the possible exception of Hengham's Summæ."[5] This popularity was due to its brevity, to its lucidity, to its thoroughly practical character, and to the fact that it was written in the vernacular language of the courts.[6] Internal evidence shows that it was written just before the Statute of Marlborough (1267).[7] Like many other of these tracts, it has matter which is common to several of them; but it is most closely connected with Hengham's *Magna*. The similarity is so great that Mr. Woodbine is well warranted in thinking that Hengham was its author, and that the statement to that effect found in two of the MSS. is correct.[8] Part of this tract was printed at the end of Selden's edition of Fleta. This was probably due to the fact that the scribe who was copying Fleta copied it from an examplar which contained a MS. of the Fet Asaver at the end of Fleta's MS. When he discovered that he was not copying Fleta he stopped; but the MS. of Fleta with the part of the Fet Asaver which he had copied went to the printers, and so was printed with Fleta's text.[9] The *Judicium Essoniorum*[10] was, as the internal evidence shows, written between the Statute of Marlborough (1267) and the first Statute of Westminster (1275).[11] One MS. attributes it to Hengham,[12] and a comparison between some passages in it and passages in the *Magna* shows that this is very probably correct.[13] The learning of essoins was a complicated branch of mediæval procedure; and, as Mr. Woodbine says, the tract shows that the reforms made in

[1] Woodbine, op. cit. 7. [2] Selden's Preface to Hengham.

[3] For a Cambridge MS.—Add. 3097—containing an abridgement of certain statutes attributed to Hengham, see Woodbine, op. cit. 4 n. 2. Mr. Woodbine thinks that he may have made it by way of preparation for writing the Parva.

[4] Woodbine, op. cit. 53-115; it is so called from the words with which it begins —"Fet asaver al commencement de chescum plai ke est plede en la court le Rey, ou ceo est plee de terre ou de trespass ou de ambedeus."

[5] Ibid 7. [6] Ibid 8, 9.

[7] Ibid 9-11. The evidence turns upon the description given in the tract of the process to compel appearance, which was changed by the Statute of Marlborough (1267), and again by the Statute of Westminster I. in 1275.

[8] Ibid 15-25.

[9] Ibid 5-7; we shall see that in other cases the form of the MS. which went to the printers was very literally produced by them, below 617; cp. above 223.

[10] Ibid 116-142. [11] Ibid 27-28.

[12] Ibid 28. [13] Ibid 29-36.

this branch of the law by Edward I.'s legislation were very necessary.[1] It was a popular tract because "of its treatment in a brief and concise way of the more usual and common points of the working of the law of the day, in such a way that they could be more easily understood and comprehended."[2] The last two of these tracts—the *Cum sit necessarium* or *Modus Componendi Brevium*,[3] and the *Exceptiones ad Cassandum Brevia*[4]—are complementary tracts. The first was written some time after 1285, and it too has been ascribed to Hengham.[5] But there is no such strong internal evidence, as there is in the first two of these tracts, to warrant a decided opinion, though there is nothing that makes it impossible that Hengham should have written it. It is a model of judicious compression. "It takes into account all the usual of the many varied legal relations with which writs had to do, seisin and disseisin, donations, rights of women to land, the king's court and his judges, the rights of heirs, the lord's court and his treatment of his tenants, customs, and services, the land rights of religious bodies, common of pasture, and general exceptions. Detail and exhaustive treatment we cannot expect within so narrow a space, yet of the broader outlines of these subjects nothing of importance is left out. Nor is the tract a mere collection of facts thrown together at random; the arrangement of topics follows a definite plan, and the writer avoids those digressions so common in the longer treatises."[6] The tract ends with a very brief account of exceptions, though it three times states that exceptions are to be discussed at greater length.[7] Mr. Woodbine thinks, with some reason, that the last of these tracts—the *Exceptiones ad Cassandum Brevia*—is really the second part of this tract from which it had become detached "by the process of successive copyings."[8] As he says, it was the more easy for such a detachment to have taken place because the first part was written in Latin and the second in French. This conclusion is rendered pretty certain, firstly by the fact that in the last sentence of the *Modus* the author says he will write of exceptions in French, because such exceptions are always pleaded in that language;[9] and secondly

[1] Woodbine, op. cit. 37.
[2] Ibid.
[3] Ibid 143-162.
[4] Ibid 163-183.
[5] Ibid 38-39; it has also been ascribed to John de Metingham; but, as Mr. Woodbine says, there is no evidence either for or against the authorship of either Hengham or Metingham, ibid 42.
[6] Ibid 42-43; a synopsis of the plan is given at pp. 43-45.
[7] Ibid 45.
[8] Ibid 45-46.
[9] "Sed quia consuetudo regni Angliæ talis est, quod placita coram justitiariis per narratores in romanis verbis, et non in latinis, pronunciantur; idcirco hujusmodi exceptiones lingua romana in scriptis rediguntur," ibid 162.

by the fact that it supplies just the information which the *Modus* has promised to give, and which is lacking in it.[1]

(iii) The *Brevia Placitata* consists, as Maitland says, "of precedents for pleadings in the king's courts, each precedent consisting of a writ, a count, and a plea."[2] The *Casus Placitorum* or *Cas de Demandes*[3] is a collection of the decisions of certain judges, all of whom lived before 1260,[4] made by some writer who probably had access to certain rolls from which he made a selection. It is perhaps the most interesting of all these tracts because, both in its style and its subject matter, it anticipates what was to be, in the succeeding centuries, the main source of the literature of the common law—the Year Books.[5] It is like them in its style—the cases often begin with some such phrase as "Un prodhomme porte un bref," or "Un homme en pleda;"[6] and it is like them in its subject matter. It consists both of cases and notes thereon;[7] and the cases contain "short statements of legal principles and rules of procedure."[8]

It is clear from these tracts that the day for philosophical treatises upon the law has gone by. The common law is becoming a special subject known only to the practitioners of the royal courts; and the principal need of the practitioner is for some simple information as to the rules of court. The law itself lies beyond. The rank and file of the profession, immersed in the routine of practice, never attain to a conception of law as a reasonable and logical science. What they want is short rules about writs, up-to-date knowledge of the rules of procedure, the most recent "cautelæ"[9] in the art of tripping up an opponent. But these rules can be best learned by attending to the decisions of the courts. And thus it is that the two last-mentioned of these tracts foreshadow what (apart from the statutes) will be, in the following period, the two chief sources of law—the Register of Writs[10] and supplementary works on pleading, and the Year Books.[11] In the Register and the supplementary works on pleading are contained the list of the remedies given by the law and information as to their use: in the Year Books the cases of practical importance and notes thereon.

[1] Woodbine, op. cit. 48-49. [2] The Court Baron (S.S.) 11.
[3] Woodbine, op. cit. 12-14.
[4] Thurkilbi, Henry de Ba or Baa (who may be either Henry de Bath or Henry de Bracton), Simon de Wauton, Alan de Wausand, Gilbert de Preston, Henry of York, ibid 13 n.
[5] Ibid 14 n.; for the Year Books see below 525-556.
[6] Woodbine, op. cit. 14 n.
[7] Ibid. [8] Ibid 12-13.
[9] This expression is used both by William of Drogheda and by Hengham (Magna c. 5).
[10] Below 512-525. [11] Below 525-556.

The work of our English Justinian, like the work of his prototype, stereotyped because it settled. The fact that Littleton's treatise,[1] the last and best book of this later mediæval period, deals with almost the same branch of law as some of these short tracts of Edward I.'s reign, is an eloquent commentary upon the fixity and rigidity resulting from the precocious settlement of the sphere of common law jurisdiction. We have passed the period in which English law has been largely developed by the writings of successive commentators. We have reached the period in which it is developed by reported cases; and, as Maine has pointed out,[2] the former method of development makes for expansion in a far greater degree than the latter.

Before I conclude my account of the influences which shaped the development of the law under Edward I. I must say something of that mysterious work known as the Mirror of Justices.[3] It is not, as we shall see, in any sense an authority for the history of English law, and its influence has been posthumous; but it probably belongs to this period. It was at one time supposed that a reference to Edward II.[4] showed conclusively that the book was composed in that reign. But it is by no means unlikely that a writer who knew of the laws of Edward the Confessor, who regards the government of England as wholly Saxon, and who ignores the Norman Conquest, should call the first Edward the second.[5] Internal evidence is strong to show that it was written or compiled before 1290.[6] The one existing MS. is later in date; but that MS. is not, in the opinion of Maitland, the original. "It is full of mistakes. Some of these look to me like the mistakes of a clerk who is writing from dictation; they are mistakes committed by the ear; but others seem to me to be mistakes of the eye."[7] The book was first cited in court

[1] Below 573-575. [2] Village Communities 48-49.

[3] The book was first printed in 1642; and it was translated in 1646 by William Hughes. The translation was republished in 1768 and 1840. The best edition is that by Mr. Whitaker published for the Selden Society with an introduction by Maitland. My references are to this edition.

[4] P. 141. The reference, however, is to one of Edward I.'s statutes (West II. c. 34, 1285).

[5] Introd. xxiii. It may be noted that in Gilbert de Thornton's Summa of Bracton (above 237) the first Edward is called the second, L.Q.R. xxv 47 n. 1.

[6] Ibid xxiv, "Our author ends his work with a criticism of statutes which are brought under review in an order which is nearly chronological. He comments on Magna Carta, on the Statutes of Merton (1235-1236), Marlborough (1267), Westminster I. (1275), Gloucester (1278), *De Viris Religiosis* (1279), Westminster II. (1285), upon the writ Circumspecte Agatis, which is attributed to 1285, and upon the Statute of Merchants which was made in the same year. The last document he calls a new statute. Here he stops." We should certainly expect *Quia Emptores* (1290) to be noted as an abuse. Moreover, his denunciation of unjust judges has much point if written in 1289 (above 294-299); but this is not conclusive, cp. Bracton's writings on the same theme, above 229-230.

[7] Introd. lii.

in 1550.[1] Coke procured a copy and "devoured its contents with uncritical voracity."[2] He thought that it contained an account of the law as it existed in pre-Norman, or even pre-Saxon days.[3] Through Coke's use of it it was long regarded as an important source of English legal history. Reeves, indeed, regarded it with suspicion;[4] and it was decisively pronounced to be apocryphal by Sir Francis Palgrave,[5] the historian who exposed the forgeries of the False Ingulf.[6] Even in the nineteenth century it was so thoroughly trusted by Finlason, the editor of Reeves, that he used it to supplement and, as he thought, to correct the book which he was editing. We know now that the work is no authority for the law of the thirteenth or any other century. The authorship and the object of the book remain a riddle—as great a riddle as many parts of the Saxon period with which the book professes to deal.

As to authorship, there are some circumstances which throw suspicion upon one Andrew Horn, fishmonger, and chamberlain of the city of London, who died in 1328.[7] We know that this Andrew collected statutes, charters, and other documents relating to the city of London; and it is conjectured that he had a hand in compiling the important Annales Londonienses. We know from his will that he was the owner of various legal and historical books. Among these books were a copy of Britton, and also our one MS. of the Mirror. Another of his books—very important in any enquiry as to the authorship of the Mirror—was a book De Veteribus Legibus Angliæ. This book contains some of the Anglo-Saxon laws, the laws of Edward the Confessor, the laws of William I., the laws of Henry I., a Glanvil, some historical remarks tending to the glorification of the city of London, and the assertion of the supremacy of the King of England over the British Isles, a list of Edward I.'s statutes, and the titles of some of the text-books of Edward I.'s reign. At the end of the book there is a note to the effect that more as to the law will be found in Britton and the Mirror. On one of the pages of this book

[1] Introd. ix, citing Plowden 8. [2] Ibid.

[3] 9th Rep. Preface, "In this book in effect appeareth the whole frame of the common law of this realm;" 10th Rep. Pref., "The most of it was written long before the Conquest, as by the same appeareth, and yet many things added thereunto by Horne, a learned and discreet man, as it is supposed in the reign of Edward I.;" Third Instit. 5, he quotes a precedent of an appeal of treason of the time of King Alfred from the Mirror pp. 54, 55.

[4] H.E.L. ii 232-238.

[5] English Commonwealth ii cxiii, cxiv, "Whatever may have been the motives for the composition of the Mirror, we are compelled to reject it as evidence concerning the early jurisprudence of Anglo-Saxon England."

[6] Quarterly Review (1826) No. 67. [7] Introd. xii-xxi.

there is the following line in red ink: "Horn michi cognomen Andreas est michi nomen;" and above it is a fish denoting Horn's calling. The book shows that Horn had some slight acquaintance with canon law, and that he considered that the English race first came from Saxony. Now the Mirror contains at the beginning four verses,[1] and below them the same verse in red ink as is inserted in the book De Veteribus Legibus. If the four verses are connected with the fifth it would be easy to infer that they are meant to convey an assertion as to Horn's authorship. But they may not be so connected. It may well be that the fifth is placed there merely to show the ownership of the MS.—to act as a kind of book plate. On the other hand, the sense is better if they are connected. Then, again, the writer of the Mirror had, like Horn, a bowing acquaintance with the canon law, and he regards the Saxons, "from Almaine," as the ancestors of the English people. Moreover, the only known copy of the Mirror comes from Horn's possession; and he also possessed the other apocryphal legal works contained in the book De Veteribus Legibus. These facts point to the authorship of Horn. But the whole tone of the Mirror is so unlike what we should expect from a chamberlain of the city of London, who could patiently calendar MSS. and write good history, that Maitland is, on the whole, inclined "to give him the benefit of the doubt," and to leave unsettled the question of its authorship.[2]

Leadam has put forward a new and a more definite view as to the authorship of the book.[3] He thinks that a great part of the book was compiled in the early years of the thirteenth century, and that references to later statutes were subsequently added. He thinks that it can be gathered from the internal evidence of the book that the writer had special knowledge of the district of the Cinque Ports. He would therefore identify him with the Hornes of Horne Place, situate in the parish of Appledore, on the borders of Kent and Sussex His work, he supposes, got into the hands of Andrew Horn—a member, he conjectures, of the same family—and was by him transcribed and enlarged so as to include many of Edward I.'s statutes. The suggestion is ingenious. It would explain

[1] "Hanc legum summam si quis vult jura tueri
Perlegat et sapiens si vult orator haberi;
Hoc apprenticiis ad barros ebore munus
Gratum juridicis utile mittit opus.
Horn michi cognomen Andreas est michi nomen."
For the meaning of these verses see Introd. xx, xxi, liv, lv.

[2] Introd. l, li.

[3] L.Q.R. xiii 85-103.

many of the archaisms in the law of the Mirror. It would explain the absence of any strong partiality for the city of London, such as we find in the book De Veteribus Legibus. But we shall see that the subject matter of the book is so variegated, and displays so many heterogeneous tendencies,[1] that arguments drawn from internal evidence have less weight than usual. The author's cranks are so many that internal evidence could be found for many like theses.[2] If we admit that the author had some special knowledge of the district of the Cinque Ports, we must also acknowledge that we know little of the Hornes of Horne Place. Leadam's theory may be true. It is very far from being proved.

The purpose of the work is as great a puzzle as the authorship. Maitland lets his mind play around the many theories which different portions of the book suggest. In the end he can only tentatively suggest that, if it had any purpose at all, it was meant to be a skit upon the state to which the law had been reduced by the corruption of the bench, which, as we have seen, was exposed in Edward I.'s reign.[3] This view perhaps presupposes that it was all written in Edward I.'s reign. We have seen that Leadam inclines to the view that it was a work edited in Edward I.'s reign.[4] He seems inclined to regard it as intended to be a serious work upon law. But in the face of the statements about law which it contains it is a little difficult to accept this view.[5]

Sir F. Pollock has imagined yet another origin.[6] Suppose a foreign clerk, say from Gascony, had settled in England, and, after studying English institutions in an amateur way, had set to work to write a book about them; suppose, too, that, being in want of illustrations from ancient history, he had asked some learned clerk for some relevant historical facts; suppose this clerk had played a joke upon him by inventing a few facts for his benefit—we might get a work like the Mirror.

Every man who reads the book will be driven to conjecture. Its subject matter sets us doubting whether it was ever meant

[1] Introd. xlviii, "It is a variegated tesselated book."

[2] Ibid, "What then shall we say of this book? and what shall we call its author? Is he lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar? A little of all, perhaps, but the romancer seems to predominate."

[3] Ibid xlix; above 294-299. [4] L.Q.R. xiii, 98, 99, 103.

[5] Introd. xxxvii, "If at the present day a man wrote a law book, and said in it, Law forbids that murderers should be hanged; estates tail cannot be barred; bills of exchange are not negotiable instruments, he would be guilty of no extravagance for which a parallel might not be found in the Mirror." At p. 60 he supposes that one Nolling was indicted for a sacrifice to Mahomet.

[6] L.Q.R. xi 395, 396, "Where the fact is so odd as to make all hypotheses improbable we may be allowed to suggest one improbability more."

to be taken as a serious statement of facts. The fact that it exists only in one MS., and that not the original, shows that it never attained popularity.[1] Indeed, as we have seen, it was unknown till Coke's credulity gave it a temporary currency as an authoritative work upon the earliest period in the history of our law. On the face of it it purports to be somewhat of a romance—to set forth rather the writer's ideals about law than the law itself. The laws are uncertain, says the writer, the judges are corrupt. "I the prosecutor of false judges, and falsely imprisoned by their order, in my sojourn in gaol searched out the privileges of the kings and the old rolls of his treasury, wherewith my friends solaced me, and there discovered the foundation and generation of the customs of England which are established as law . . . and we discovered that law is nothing else than the rules laid down by our holy predecessors in holy writ for the salvation of souls from everlasting damnation, although it be obscured by false judges." The writer then gives a list of the books of the Old and New Testament, and states that he has collated them with the usages of this country. The result of his labours, he says, is this book in five chapters. The first chapter deals with sins against the holy peace, the second with actions, the third with exceptions, the fourth with judgments, the fifth with abuses. "And this summary I have called the Mirror for Justices according as I found the virtues and the substances sanctioned by bulls and by holy usages which have obtained since the time of King Arthur in accordance with the rules aforesaid."[2] The writer has thus gone to the Bible for his ideal of law; and this explains what Maitland has called the "Puritanism" or "bibliolatry" of the book.[3] All wrongs are to him "sins" of greater or less degree. He uses legal terms such as larceny or perjury; but under the influence of his peculiar views, he extends them enormously. "Whatever is morally bad as theft is theft, and should be treated as such."[4] He goes to the Bible for his ideal of law, and he goes to the kings of Saxon or pre-Saxon times for the period when his ideal was realized. The Saxons conquered England for its sins, and the writer's hero—King Alfred—established the law and the constitution of the country.[5] The law was then administered far better than now. Alfred hanged forty-four judges for offences very like those which we see commonly committed at the present day.[6] The Saxon times and the Saxon law have been so

[1] Introd. li.
[2] The Mirror 1-3.
[3] Introd. xxviii-xxxi.
[4] Ibid xxix.
[5] The Mirror 6-8.
[6] Ibid 166.

far forgotten that a writer can say of them what he will—can make of them a state of Nature and a law of Nature. The fifth chapter, dealing with abuses, the writer perhaps regarded as the most practical. It is a detailed account of the points in which the prevailing customs and statutes fall short of the writer's ideal.[1]

The curious biblical standpoint of the writer puts him outside the ordinary current controversies of the day. He seems now to support the king against the claims of the barons,[2] now to seek to diminish the royal prerogative.[3] He will now exalt the claims of the church,[4] now seek to restrict its rights.[5] He shows no preference for the merchants.[6] He is for an ideal equality which is all his own. The lord owes as much to the tenant as the tenant to the lord.[7] The termor and the villein should be protected, as the tenant for life is protected, by the assize of novel disseisin.[8] "We wrong the man," says Maitland, "if we wish to make him the representative of a class. He stands for the sake of art or mystery outside all classes."[9] If we can believe the introductory sections of the work we should say that he was constructing his ideal system of law out of his head, assisted by the Bible.

But the views of those who thus construct romances—legal, historical, or scientific—are unconsciously coloured by the age in which they live. There is perhaps some ground for thinking with Leadam[10] that a large part of the work was written in the early part of the thirteenth century. "In a good many instances

[1] Its subdivisions are (1) Abuses of the Law, (2) Defects in the Great Charter, (3) Reprehensions of the Statutes of Merton, (3B) Reprehensions of the Statutes of Marlborough, (4) Reprehensions of the First Statutes of Westminster, (5) Reprehensions of the Second Statutes of Westminster, (5B) On the Statute of Gloucester, (6) Reprehensions of Circumspecte Agatis, (7) Reprehensions of the new Statutes of Merchants. Under the first head there are 155 abuses.

[2] The Mirror 113, "As regards alienations and occupations of royal franchises there can be no . . . reliance on a title by prescription, for . . . such avowries of long continuance are rather to be reckoned as persistence in wrong-doing than as lawful exceptions;" cp. vol. i 87.

[3] Ibid 179, "The prohibition of the *breve quod vocatur Præcipe* is disregarded, for every day so many writs which are possessory in form are issued, and this too by statute, that the lords lose the cognizance of matters concerning their fees and the profits of their courts;" cp. vol. i 58-59; vol. iii 13, 24.

[4] Ibid 195, "The statute about rape (West. II.) is reprehensible, for no one can by statute ordain that a venial shall be converted into a mortal sin, without the assent of the pope or the emperor."

[5] Ibid 183, "A clerk has no more right to sin with impunity than has a layman"—as Maitland says, an upholder of ecclesiastical privileges would have said that this sentence "hovered between truism and heresy," Introd. xxx n. i.

[6] Ibid xl, xli; the Mirror 164, abuse 81.

[7] Introd. xxxix.

[8] The Mirror 67, 68.

[9] Introd. xli.

[10] L.Q.R. xiii 95-97; cp. the Mirror 155, 156, abuses 1 and 2 point to Henry III.'s reign—it is an abuse that the king is beyond the law, that Parliaments are not frequently held, that the king is ruled by clerks and aliens.

the 'abuses' would disappear if the law of 1200 or even of 1250 could be restored."[1] The feudal order of society, the courts, and the officials are those of England of that period. The writer gives colour to his romance by mentioning names like Glanvil[2] and even Martin of Pateshull,[3] by using the little history which he knows, and by inventing more. He will sometimes recollect some archaism which will fit in with his ideals. Thus he remembers that the villeins were not always confused with serfs;[4] he makes the essence of treason to be treachery to one's lord.[5] He does not cite, and we can hardly expect him to cite, serious writers for accurate details.[6]

If this is the basis of a book which has been re-edited and enlarged by some later writer or writers with some slight acquaintance with Bracton, and with some knowledge of Edward I.'s statutes, it will explain some of the contradictions of the book. Is it wildly improbable to suggest that this age of legal renaissance produced a legal romance, just as other ages of renaissance in other branches of knowledge have produced an Utopia and a New Atlantis? If this be so it is a singular attempt by a writer of the thirteenth century to construct an ideal system of law out of the shifting legal panorama of the period, by going back to biblical first principles and letting his fancy play upon the mixture of the archaic, the feudal, the Romanist, the royalist, and the constitutional tendencies which he saw reflected in the institutions and the law of his time.

The Development of the Rules of Law

The history of the influences which shaped the development of the law during this period tells us something of the characteristic features of its rules.

In this, as in the preceding period, the changes which were taking place in the law of procedure give us a very fair index to the general trend of the changes which were taking place in the law itself. Of these changes I have already said something. We have seen that the list of writs is becoming fixed and

[1] Introd. xliii, xliv. See e.g. abuses 103, 138 as to appearance by attorneys.
[2] The Mirror 31, 65, 72, 171. [3] Ibid 147.
[4] Ibid 79; Vinogradoff, Villeinage 415-421.
[5] Ibid 21; cp. Alfred's law, above 48 n. 4; vol. iii 287-288.
[6] Introd. xxvii, "For the laws of Henry I. (and of Henry I.'s name he is very fond) he does not go to Henry of Huntingdon, nor to William of Malmesbury, nor even to the Leges Henrici; for laws of Henry II. he does not go to the Gesta, nor to Hoveden, nor to Diceto, nor to Glanvil's book. He does not go to Glanvil's book even when he is going to speak of Glanvil. He is not corroborated; he scorns corroboration."

stereotyped.[1] The mass of cases decided by the royal courts,[2] and the rise of a separate legal profession,[3] are giving sharpness and definition to procedural rules. We shall see that the victory of the jury is exercising a powerful influence over the mode in which cases are pleaded in and heard by the court, and that, as a result, the origins of that peculiarly English branch of the common law—the law of pleading—begin to emerge.[4] Thus we can see in outline the machinery by which the cases which fall within the sphere of the common law will be dealt with for many centuries.

These changes in the law of procedure tended to give a new fixity and rigidity to the rules of the common law. This affected the development of the rules of the common law in three main directions. In the first place, it made for the gradual decay of those equitable characteristics which were a strongly marked feature of the rules of the common law in the age of Bracton.[5] In the second place, it made for the growth of certainty and system in the rules of law; and this tended to make the common law a very uniform system. With the one exception of the special custom of Kent,[6] the Year Books of Edward I.'s reign show very little variation from the common type.[7] In the third place, this growth of certainty, and system, and uniformity materially helped the common law to establish its supremacy over, and to impose its conceptions upon, the many local courts of various kinds through which the work of government was carried on.[8]

Of this last effect of the new fixity and rigidity of the rules of the common law I shall speak in the next section of this chapter.[9] Here I shall say something, in the first place, of the decay of the equity administered by the courts of common law; and in the second place of the development of the two branches of the law which show a marked progress during this period—the land law, and the law of crime and tort.

The Decay of the Equity Administered by the Courts of Common Law.

One of the main causes for the decay of those equitable principles which had, up to this period, characterized the administra-

[1] Above 308; below 514-515.
[2] Above 326.
[3] Above 311-318.
[4] Vol. iii 627-639.
[5] Above 245-250.
[6] Vol. iii 259-263.
[7] Such special customs as are noted in the Year Books are usually of the customs of boroughs, Y.BB. 20, 21 Ed. I. (R.S.) 220—custom of a town, and 32, 33 Ed. I. (R.S.) 511—custom of Ipswich; or a few stray survivals of local usages, Y.BB. 20, 21 Ed. I. (R.S.) 322-328—custom alleged that land is partible; 21, 22 Ed. I. (R.S.) 8—custom to distrain; 30, 31 Ed. I. (R.S.) 164—custom of Cornwall as to villeinage; ibid 240—custom that no Englishry is presented in Cornwall.
[8] Vol. i chap. 2.
[9] Below 395-405.

tion of the common law, was the rigidity introduced by the doctrines firstly that new writs must in general be sanctioned by statute, and secondly that statutes should have the sanction of Parliament.[1] "Every writ brought in the king's court," it was said in 1294,[2] "ought to be formed according to the common law or statute. . . . Every new writ should be provided by the common council of the realm." But this rigidity did not come all at once. In Edward I.'s reign the judges were not prepared to tie their hands too tightly. They were not prepared to abandon completely their claim to administer both law and equity; and they were helped, as the opposing counsel's argument in the case cited shows, by the clause of the Statute of Westminster II. which empowered the Chancery to issue writs in consimili casu. In 1294 Bereford, J., adopted this line of argument. He said,[3] "Where one comes to the Chancery and prays a remedy . . . no remedy having been previously provided, then, in order that no one may quit the court in despair, the Chancery will agree on the form of a writ, which writ shall serve him for his case, which before the framing of the writ was unprovided for." In Edward II.'s reign also we see the same hesitation between the maintenance of the strict technical rules of law and the claims of equity. In 1310-1311 Stanton, J., said to a plaintiff, "Well it is for me that you are agreed, for the court is relieved of much trouble, for in justice, although you have good faith on your side, the law of the land would have served you nought."[4] In the Eyre of Kent of 1313-1314 there is a case in which the court on equitable grounds refused to abate a writ;[5] and in 1312-1313 the court seems to have upheld a writ of Quare ejecit infra terminum though not in proper form.[6] As we might expect, therefore, the decay of the equity administered by the common law courts was a gradual process; and we find in the Year Books of Edward I., Edward II., and even of Edward III.'s reigns many traces of those liberal and equitable ideas which appear in Bracton's works, and

[1] Above 308.

[2] Y.B. 21, 22 Ed. I. (R.S.) 528—the opposing counsel urges the opposite doctrine —"The Statute (Westminster II. c. 24) states that no one shall depart from the Chancery in any new case before a remedy has been devised for that case: and inasmuch as this writ has been given to us and has been devised by the Chancery and the court we pray judgment;" for this clause of the Statute of Westminster II. see vol. i 398 n. 3.

[3] Y.B. 21, 22 Ed. I. (R.S.) 322.

[4] Y.B. 4 Ed. II. (S.S.) 87; and see Y.B. 8 Ed. II. (S.S.) 205 where Inge, J., gave effect to the intent of the framer of a charter in spite of its informal wording; ibid 106, where Toudeby *arg.* appeals to equity as proof of the correctness of his view of the law.

[5] The Eyre of Kent (S.S.) ii xvi 42.

[6] Y.B. 6 Ed. II. (S.S.) 226-227—in spite of the opposing counsel's argument that to a writ not in proper form he ought not to be made to answer "without common assent of the Council;" for this writ and its limitations see vol. iii 214.

many premonitions of doctrines which, in later years, are associated chiefly with the equity administered by the chancellor.

We have seen that in Glanvil's day the conception of a mortgage held by the king's court was far more like that held by the court of Chancery than that held by the common law courts in later days;[1] and even in Edward I.'s reign it was necessary for Britton to state clearly that the law did not recognize an equity of redemption.[2] Similarly in the Year Books of Edward I.'s reign we see the writ of prohibition used much as it was used in Bracton's day;[3] and in another case of the same reign we see something very like the Chancery process of subpœna.[4] In 1307-1308 the court gave relief against penalties.[5] It should however be noted that in the Eyre of Kent in 1313-1314 this relief was based upon the principle that if the exaction of a penalty contravened the church's prohibition of usury it was irrecoverable. It was therefore only as against penalties which had this effect that the court would give relief[6]—a very different principle from that followed in later days by the court of Chancery.[7] It also issued on some occasions something like a mandatory,[8] and on another occasion something like a perpetual injunction.[9]

But the most remarkable instance of this endeavour to temper strict law with equity is to be found in the Bills in Eyre, which have been discovered by Mr. Bolland.[10] It is probable that they originate in instructions to hear *querelæ* given to the commissioners who held the inquest of 1274, from the returns to

[1] Above 194; vol. iii 128-129. [2] ii 128.

[3] Y.B. 30, 31 Ed. I. (R.S.) 324—"Note, if a man ought to have house-bote and hay-bote in another's wood, and he to whom the wood belongs wishes to destroy the wood, the other can bring a Prohibition, and after that an Attachment;" above 248-249; this idea of making the prohibition do some of the work of the injunction was revived by the common law procedure commissioners of 1852-1853, vol. i 636.

[4] Y.B. 30, 31 Ed. I. (R.S.) 194, *Berewick*, J., "We command you that under penalty of one hundred pounds you have the infant here before us on such a day."

[5] Y.B. 2, 3 Ed. II. (S.S.) xiii, xiv 58; cp. Hazeltine, Essays in Legal History (1913), 268, 269.

[6] *Passeley*, "This action of debt is based upon a penalty and savours of usury, of which the law will not permit you to have recovery. For example, if I say that I hold myself bound to you to pay you ten pounds upon such a day, and that if I do not pay them to you upon that day I am then bound to you in forty pounds; and if I fail to pay the ten pounds upon the appointed day, the law will not allow you to recover, by way of usury, the forty pounds. *Stanton*, J., Penalty and usury are only irrecoverable when they grow out of the sum in which the obligee is primarily bound," Eyre of Kent (S.S.) ii 27.

[7] Bk. iv Pt. I. cc. 4 and 8; this case illustrates the fact that it was not necessarily all penalties that infringed the prohibition against usury, as was somewhat hastily assumed by Lord Parker in Kreglinger v. New Patagonia Meat Co. [1914] A.C. at pp. 54-56; for the history of usury and the usury laws see Bk. iv Pt. II. c. iv I. § 1.

[8] Eyre of Kent (S.S.) i 91—an order to a person who had diverted a road to restore it; ibid iii 129—an order to restore a stream "to its proper and ancient channel."

[9] Y.B. 2, 3 Ed. II. (S.S.) xiv 74; Hazeltine, op. cit. 280, 281.

[10] The Eyre of Kent (S.S.) ii xxi, xxx; Select Bills in Eyre (S.S.)

which the Hundred Rolls were compiled;[1] and that, as the same instructions were given to the justices in Eyre from 1278 onwards, then *querelæ* could be and were always presented at a general Eyre by bill.[2] These Bills raise many important questions—the most important, perhaps, is the question of their connection with the later procedure by bill in the Chancery. In considering this and other questions connected with them I shall in the first place describe the general characteristics of these bills. Secondly, I shall say something of the term "bill" and the various sorts of "bill" known to English law; and I shall endeavour to ascertain which of these categories of bills, the bills in Eyre most resemble. Thirdly, I shall point out some salient differences between the procedure upon these bills in Eyre and the procedure upon the bill in Chancery.

(i) *The Characteristics of the Bills in Eyre.*

These bills are found chiefly in the Eyre of Shropshire of 1292, the Eyre of Staffordshire of 1293, the Eyre of Kent of 1313-1314, and the Eyre of Derbyshire of 1331.[3] They present a striking similarity both in form and in substance to some of the early bills addressed to the chancellor, or to the chancellor and Council. The suppliants are not tied down to the strict rules of form which governed the wording of the writ.[4] They are phrased in simple and often in illiterate language.[5] Some, perhaps, were written by a professional letter writer.[6] Others, when written more than ordinarily badly, were copied literally by some clerk.[7] They were largely but not exclusively used by poor people;[8] and, like the later bills addressed to the chancellor, they pray a remedy "for God's sake," "for charity's sake," "for the love of Jesus Christ," "for the Queen's soul's sake."[9] They are generally addressed "A les Justices nostre Seygnur le Roy;"[10] and they ask for a remedy—generally damages, sometimes an injunction or other order—on equitable grounds.[11] And the wrongs for which these remedies are sought are of the most

[1] H. E. Cam, Vinogradoff, Oxford Studies vi 133-138.
[2] Ibid 57—when the terms of the commission are set out; 136-137.
[3] Select Bills in Eyre (S.S.) xxxiv.
[4] Eyre of Kent (S.S.) ii xxvi.
[5] Select Bills in Eyre (S.S.) xix. [6] Ibid xix.
[7] Ibid xix, xx. This is Mr. Bolland's conjecture to explain the fact that "some of the most barbarous of them, so far as their contents are concerned, are written in a script of more than average fairness."
[8] Eyre of Kent (S.S.) ii xxv, xxvi.
[9] Ibid xxv; this expression occurs chiefly in the Shropshire and Staffordshire Eyre rolls, and is explained by the fact that Eleanor the wife of Edward I. had only just died, Select Bills in Eyre (S.S.) lviii.
[10] Ibid xxii.
[11] Select Bills in Eyre (S.S.) xl; see e.g. cases 10, 33, 64.

varied character. Mr. Bolland says:[1] "We see that no misfeasance or non-feasance was too slight or too grave to be the subject of a complaint by a bill in Eyre. The recovery of debts, large and small, and the enforcement of contracts were sought for by them. Damages were claimed by them for detinue, breach of contract, trespass, negligence, illegal distress, wrongful imprisonment, for abduction of ward, for conspiracy to deceive the court and pervert the course of justice, and for almost every other tortious act or omission by which a man might be endamaged. . . . They tell of crimes of violence for which up to comparatively recent times a man . . . would certainly have been hanged." Some of the stories they relate are wonderful. One, which tells of a gallant who broke into a house through a cellar wall, and eloped with the faithless wife and part of the husband's property,[2] reads, as Mr. Bolland says, "like the synopsis of a story in some such collection as Les Cent Nouvelles Nouvelles."[3] They shed all sorts of sidelights upon various aspects of English history—social, economical, and legal. It is true that we cannot rely on the strict accuracy of the stories told. They are "ex parte statements written with a purpose;" and in many cases the prosecutor fails to appear to prove his facts. But Mr. Bolland is probably right in thinking that there is a substratum of truth in many of them; and that intimidation may account for many of the failures to prosecute.[4]

It is from the point of view of legal history, and more especially from the point of view of the equity which the Eyre was asked to administer, and its connection with the later system of equity administered by the chancellor, that they are most important. Two illustrations will show this clearly.

"Dear Sir," runs one of those bills,[5] "of you who are put in the place of our lord the king to do right to poor and rich, I cry mercy, I John Fesrekyn make my complaint to God and to you, Sir Justice, that Richard the carpenter that is clerk of the bailiff of Shrewsbury detains from me six marks which I paid him upon receiving from him an undertaking in writing by which he bound himself to find me in board and lodging in return for the money

[1] Select Bills in Eyre (S.S.) xl. [2] Ibid case 49. [3] Ibid xxiii.

[4] Ibid xlix-lii; "We are inclined to ask whether it is not at least as likely that these poor folk who made detailed complaints of wrong and outrage, and then flinched from prosecuting them to an issue, or, if abiding an issue, not only gained naught by it, but were fined for gaining naught by it, were in the main speaking the truth, as that there was no pressure brought to bear upon them to let their complaints drop; . . . no corrupt election of jurors, no corruption or intimidation of jurors when chosen. . . . If these complaints had not some real basis of truth in them and were not honest efforts to obtain some compensation for wrongs endured, I do not see why anyone should have been at the trouble of making and presenting them," ibid li, lii.

[5] The Eyre of Kent (S.S.) ii xxiii, xxiv.

he had from me; and he keeps not what was agreed between us, but as soon as he had gotten hold of the money he abandoned me and constrained my person and gave me a scrap of bread as though I had been but a pauper begging his bread for God's sake, and through him I all but died from hunger. And for all this I cry you mercy, dear Sir, and pray, for God's sake, that you will see that I get my money back before you leave this town, or else never shall I have it back again, for I tell you that the rich folk all back each other up to keep the poor folk in this town from getting their rights. As soon, my lord, as I get my money I shall go to the Holy Land and there I will pray for the King of England and for you, by your name, Sir John de Berewick; for I tell you that not a farthing I have to spend on a pleader; and so for this, dear Sir, be gracious to me that I may get me my money back."

In another case, "one Agnes complained by bill that, having been committed to Newgate Gaol as the result of a bill of trespass brought against herself, there to remain until she had made satisfaction in the sum of fourteen shillings and some fine in addition, the gaoler had confined her in the prison dungeon and had taken from her forty-eight shillings; but the bill omitted to say how long she was confined in the dungeon and when and where the forty-eight shillings were taken from her, and what damage she had sustained. Staunton, J., thereupon questioned her as to all the matters wherein the bill was defective and then made the defendant answer them as fully as though they had been in the bill. Such omissions would have been immediately fatal to a writ." [1]

(ii) *The Term "Bill" and the Various Sorts of "Bill" Known to English Law.*

Mr. Bolland is probably right in his suggestion that the word "bill" is derived, not as it is said in the Oxford English Dictionary from *bulla*, but from *libellus*, through the French *libelle*. The word *libelle*, like the old English word "book," meant in its original sense a charter or sheet of parchment with writing on it. It then acquired, from its use in the law of procedure, the technical sense of a complaint or statement of claim. Probably "bill" is a clipped form of *libelle*, and was used to signify a complaint.[2] But it never acquired in English law quite the precise technical meaning that it acquired in Roman law. It seems rather to have been used as a generic term for many forms of

[1] The Eyre of Kent (S.S) ii xxvi.
[2] Select Bills in Eyre (S.S.) xi-xv; Powicke, Eng. Hist. Rev. xxx 334.

complaint or petition which were not begun by original writ. Thus it was, and still is, the name for a written information as to the commission of a crime which, when found to be true by the grand jury, will become an indictment.[1] It was used to signify a complaint against the king, which could not be prosecuted by writ because no writ lay against the king.[2] The complaints against Edward I.'s judges were made by bills.[3] Actions against officials of the three common law courts, and the court of Chancery were begun by bill in the court to which they were attached;[4] there was an old procedure by bill, long disused in Hale's time, for contempts, deceits, trespasses, and other matters which might originally have been begun by writ in the King's Bench;[5] and there was the well-known procedure by bill of Middlesex against a person *in custodia Marescalli.*[6] Then we have the bills sent up by the House of Commons to the king, which, by an important change in Parliamentary procedure in the fifteenth century, became the "Billae formam actus in se continentes," and the "Bills entituled Acts," of our modern law.[7] Finally we have the bills sent up to the Council and chancellor,

[1] Stephen, History of Criminal Law i 274; and this procedure was as old as the reign of Edward I.; Solomon of Rochester, one of the judges accused before Edward I.'s commissioners "dicit quod in itinere justiciariorum talis est consuetudo pro pace observanda, quod quicumque de populo huiusmodi billam obtulerit cuicumque justiciario majori vel minori, idem justiciarius illam billam debet recipere et tradere eam duodenis juratoribus ad capitula corone, ita quod, si verum sit quot in ea continetur, ipsi presentant illud in veredicto suo, et si non sit verum quod deniant billam istam," State Trials of the Reign of Edward I. (C.S.) 3rd series, 69, cited Eyre of Kent (S.S.) ii xxii n. 2.

[2] "In old times every writ, whether of right or of the possession, lay well against the king, and nothing is now changed except that one must now sue against him by bill where formerly one sued by writ," Y.B. 33-35 Ed. I. (R.S.), 471, *per* Passeley *arg.*; cp. Eyre of Kent (S.S.) ii 77 when a suit to the king by bill in Chancery is mentioned by Spigurnel, J., as the means to recover land in the king's hand.

[3] The Eyre of Kent (S.S.) ii xxi.

[4] Hale, A Discourse Concerning the Courts of King's Bench and Common Pleas, Harg. Law Tracts 364-365; vol. i 203, 453.

[5] "These suits were for the most part for contempts, deceits, and trespasses upon the case, whether the same were committed in the same county where the court sat, or in other counties. And the course was, (1) For the party to enter his plaint or bill, (2) thereupon he had the like process as was natural in such suit, had it been thereby original;" Hale then gives some instances of these bills for trespass and other matters from Edward III.'s reign, and remarks that, in those days, if the party did not proceed by original writ he proceeded by original bill, and not by bill of Middlesex—"which seems not to be so ancient a practice;" Hale then notes the following points in connection with these bills. (1) The bill was filed before process was made. (2) The process was pursuant to the course of law. (3) The process was special according to the nature of the bill as if the suit had been by original writ. (4) "This bill lay not for any such cause, wherein the original writ lay not in the King's Bench; and therefore was not in debt, detinue, account, or covenant." (5) They were not frequent. (6) They have been long disused, partly because they diminished the king's revenues derived from writs, partly because the procedure by way of bill of Middlesex was more expeditious, Harg. Law Tracts 363, 364.

[6] Ibid 365-366; vol. i 208.

[7] Below 439-440.

or to the chancellor, which came to be the method of initiating proceedings in the court of Chancery.[1]

The question now arises, To which of these categories of bills do the bills in Eyre bear the most resemblance? Professor Powicke has suggested that these bills were necessitated by the breakdown of the criminal appeal.[2] The cases collected by Mr. Bolland prove, as he says, "the necessity of methods of accusation open to individuals."[3] In fact, if justice is to be done, the law must provide some procedure which will enable the injured person to come forward and obtain a remedy for himself. Consequently, the presentment by the country side and the subsequent indictment at the king's suit need to be supplemented by the action of the injured person.[4] We shall see that the breakdown of the criminal appeal left a large gap which was ultimately filled by the writ of trespass and its offshoots.[5] Now, at the period when these bills first appeared, the writ of trespass was as yet new, and the development of its offshoots had hardly begun. It was probably a perception of these facts which led the king to instruct his justices in Eyre to hear these complaints;[6] and thus to provide a procedure which helped to fill the gap left by the decay of the appeal, and not yet filled by the writ of trespass. It is clear that these bills in Eyre were alternative to writs;[7] and it may be that the difficulty of getting a writ from the Chancery when the Eyre was sitting in some remote part of England[8] was one of the reasons which led to their institution. When we remember these facts, and remember also the nature of the causes of complaint set forth in these bills we naturally think of that procedure by bill in the King's Bench mentioned by Hale, which had been long disused in his day.[9] These bills, he tells us, were brought "for the most part for contempts, deceits, and trespasses upon the case."[10] If this procedure was a survival from a

[1] Vol. i 450.

[2] Eng. Hist. Rev. xxx 333; for the criminal appeal and its decay see above 256-257; below 360-364.

[3] "If the cases edited by Mr. Bolland prove anything, they prove the necessity of methods of accusation open to individuals. They show that the grave charges brought against the juries of presentment in the Statute of Winchester were more than justified; to read them one would think that the tithing, the hue and cry, and the sworn knights of the hundred, had never existed. A simple form of the appeal was essential during the interval between the breakdown of the system of corporate responsibility and the reorganization of criminal jurisdiction through the justices of the peace," Powicke, Eng. Hist. Rev. xxx 333.

[4] Below 360. [5] Below 364-365. [6] Above 336-337.

[7] Eyre of Kent (S.S.) i 150; ii 74; ibid 205.

[8] Vol. i 449 n. 1. [9] Above 340 n. 5.

[10] Ibid; it will be noticed that Hale says that these bills could not be brought on any cause "Wherein an original writ lay not in the King's Bench, and therefore not in debt, detinue, account or covenant;" on the other hand these bills in Eyre did lie in these cases; but this is not surprising as the jurisdiction of the Eyre covered causes of action which belonged both to the King's Bench and to the Common Pleas,

procedure by bill which in any way resembled the bills in Eyre, it would naturally tend to fall into disuse when writs of trespass became common, and numerous writs of trespass on case began to develop.[1] Moreover, the procedure by bill of Middlesex was, as Hale notes, found to be more expeditious.[2]

At any rate we shall now see that the procedure on these bills in Eyre, in one most important respect resembled these bills in the King's Bench, and differed from the bills by which a suit in equity was begun before the chancellor.

(iii) *The Procedure on the Bills in Eyre and the Procedure on Bills in Chancery.*

A plaintiff who sued by bill was not liable to fail for defects in the form of the bill, provided the bill told an intelligible and consistent story.[3] In fact the judge would occasionally question a plaintiff in order to bring out the essential cause of complaint.[4] But it would seem that, when the bill was before the court, "the subsequent proceedings under it were exactly the same as though action had been taken by writ."[5] The endorsements on the bill seem to show, Mr. Bolland says, that the process was the same;[6] and what indications we have, seem to point to the conclusion that the course of pleading upon them in court was also the same.[7] Here again we may remember that Hale tells us that, under the bill procedure in the King's Bench, the bill must be filed before process is made, and that the subsequent course of the process was the same as if the action had been begun by writ.[8] Now all this is entirely different from the subsequent procedure upon a bill brought before the chancellor.

In the fifteenth century the course which the procedure upon a bill brought before the chancellor took was somewhat as follows:[9] The bill usually prayed that a subpœna[10] should be issued to secure the appearance and examination of the defendant. At the foot of the bill were the names of the pledges to

[1] It may be noted that in 1310-1311 a procedure by bill is alluded to as being possible in the Common Bench—John Soke, a litigant appearing in person says, "For God's sake can I have a writ to attaint this fraud?" to which Stanton, J., replies, "Make your bill and you shall have what the court can allow," Y.B. 4 Ed. II. (S.S.) 21.

[2] Above 340 n. 5.

[3] The Eyre of Kent (S.S.) ii xxvi, xxvii.

[4] Ibid ii xxvi.

[5] Bills in Eyre (S.S.) xxii.

[6] Ibid.

[7] See e.g. Bills in Eyre (S.S.), App. A., pp. 152-155, where further proceedings on several bills are given from Hale, MSS. 137, (2) and 44.

[8] Above 340 n. 5.

[9] For a general account of the procedure in Chancery see Bk. iv Pt. I. c. 4; and for the later history of this procedure see Bk. iv. Pt. II. c. 7 § 3.

[10] Sometimes the prayer was for a writ of certiorari or habeas corpus.

prosecute. In this they resemble some of the bills in Eyre;[1] but it should be observed that, in the case of the bills in Chancery, these pledges were rendered necessary by the fact that a statute of Henry VI.'s reign had prohibited the issue of a writ of subpœna till the plaintiff had found sureties to satisfy the defendant's damages if he did not prove his case.[2] When the defendant appeared, both the plaintiff and his witnesses, and the defendant and any witnesses which he might produce, were examined by the chancellor or by some other person deputed by him. To elicit the truth the chancellor could examine and re-examine witnesses, and could compel the production of documents; and these methods were very effective.

In many cases the facts elicited were decisive; and this, as Spence suggests,[3] may account for there being so many bills without any further proceedings thereon. But often there were further proceedings. The defendant might answer the bill, or demur to it, or plead specially, e.g. that the proper parties had not been joined.[4] We shall see that the common lawyers tried to introduce their technical rules of pleading, but that the chancellors set their faces against attempts to defeat plaintiffs by objections based upon the technical common law rules of pleading, maintaining that in their court cases were to be judged in accordance with their substantial merits.

Now it is quite clear that we have here a procedure very different from the procedure on the bills in Eyre. The only resemblance is in fact that the proceedings are begun by a bill. The most salient feature of the Chancery procedure—the examination of the parties and their witnesses—is absent. I conclude, therefore, that the differences between the procedure on the bills in Eyre and the procedure on the bills in Chancery are so marked that it can hardly be supposed that the one was derived from the other. Professor Adams is quite correct when he says that "the ancestor of the bill in Equity is to be found, not in the bills in Eyre, but in the petitions to the Council."[5]

But, though we cannot see in these bills in Eyre the ancestors of the later bills in Chancery, they testify eloquently to the continued existence of a set of ideas which, from the beginning of the history of the common law, had inspired the judges of the

[1] Bills in Eyre (S.S.) passim.
[2] 15 Henry VI. c. 4.
[3] Spence, Equitable Jurisdiction, i 372.
[4] Y.B. 8 Ed. IV. Trin. pl. 1, cited ibid 373 n. h.
[5] Columbia Law Rev. xvi 98; and Professor Powicke is inclined to agree; he says, "Sir Frederick Pollock has noticed the similarity between the bill in Eyre and the bill in Chancery; yet I venture to think that it would be erroneous, on the strength of this similarity, to suggest that the bill in Chancery developed from the bill in Eyre," Eng. Hist. Rev. xxx 332.

king's courts. As late as the reign of Edward III. traces of these ideas still lingered. "Conscience" was sometimes referred to,[1] perhaps it was even made the basis of an occasional decision;[2] and its claims were to some extent recognized by the invention, early in this reign, of the writ of Audita Querela.[3] Moreover, the courts of common law still continued as in the age of Bracton,[4] to give specific relief in connection with the real actions;[5] and, in the course of the fourteenth and fifteenth centuries, developments took place in some of these actions which enabled the court to give this relief, not only to remedy a completed wrong, but also to prevent an anticipated wrong.[6]

But, though the process of the decay of the equity once administered by the king's courts was slow, it was sure. We shall see that by Edward III.'s reign the courts of common law

[1] Y.B. 13, 14 Ed. III (R.S.) 96, Stonore, C.J., says, "We see on the one hand that according to good conscience and the law of God it would be contrary to what is right, if the plaintiff speaks the truth, that by such a fine, which is void, he should be disinherited; and on the other hand it is a strong measure, having regard to the law of the land, to take an averment which may annul the fine;" cp. Y.B. 18, 19 Ed. III. (R.S.) 58, 60—but the considerations of conscience, which, the reporter says, moved the justices, find no place in the record.

[2] Y.B. 27 Ed. III. Mich. pl. 20.

[3] Y.B. 17 Ed. III. (R.S.) 370, Stonore, C.J., says, "I tell you plainly that Audita Querela is given rather by equity than by common law;" vol. i 224.

[4] Above 247-249.

[5] Y.B. 18 Ed. III. (R.S.) 236, damages had been awarded in a plea of trespass for the non-repair of a sea-wall, "And afterwards on the morrow Thorpe came and prayed that the judgment might be amended, inasmuch as it had not been adjudged that the defendants should repair the walls.—Willoughby gave judgment that they should repair the walls, and that they should be distrained to do so;" cp. Ramsey Cart. iii 583 (1330-1331) for something like a mandatory injunction.

[6] Coke says, Co. Litt. 100a, "And note that there be six writs in law that may be maintained *quia timet*, before any molestation, distress, or impleading. (1) A man may have his writ of *mesne* (whereof Littleton here speaks), before he be distrained. (2) A *Warrantia cartæ*, before he be impleaded. (3) A *Monstraverunt*, before any distress or vexation. (4) An *Audita Querela*, before any execution sued. (5) A *curia claudenda*, before any default of inclosure. (6) A *ne injuste vexes*, before any distress or molestation. And these be called *Brevia anticipantia*, writs of prevention;" Coke cites no authority for this, and it is probable from the form of these writs that their use *quia timet* was a comparatively late development; thus Litt., § 141, clearly supposes that the tenant must have been distrained before *Mesne* lay; and this was the original form of the writ, F.N.B. 135 M. The earliest case cited by Fitzherbert in which the writ was brought before distraint is of Henry IV.'s reign, Bro. Ab. *Mesne*, citing a MS. Y.B. of 7 Hy. IV.; in Y.B. 22 Hy. VI. Mich. pl. 39 (p. 23), it appears that the question how far *Warrantia cartæ* lay *quia timet* was by no means clear; Fitzherbert, N.B. does not say that the writ of *Monstraverunt* was used *quia timet;* the form of the writ *Audita Querela* supposes execution, F.N.B. 103 H., and he says nothing of its use *quia timet;* the first case cited by F.N.B. for the proposition that *Curia Claudenda* lies *quia timet* is 27 Hy. VI.; the form of the writ *ne injuste vexes* would seem to permit of its use *quia timet*, but the count given by F.N.B. 10 H. supposes the wrong to be complete. I think therefore that the use of these writs *quia timet* was due to developments of the fourteenth and fifteenth centuries; similarly the writ of Estrepement was extended to all actions in which damages were recoverable, cf. Y.B. 14 Hy. VII. Mich. pl. 17, with F.N.B. 60 Y; an attempt to extend this writ still further was suppressed by Lord Egerton in 1594, Hazeltine, Legal Essays 277.

had definitely decided not to recognize the interest of the person to whose use another held land.[1] The specific relief given by the common law was bound up with and conditioned by the technical rules relating to the real actions; and cases had arisen which showed that, largely on that account, the principles upon which the common law acted were too narrow.[2] The growing inadequacy of the equitable relief which could be obtained from the common law courts drove litigants into the Chancery; and when Chancery, acting on different principles and with a different procedure, took over the administration of equitable relief, the equity formerly administered by the common law courts completely decayed. The common law judges themselves advised parties, who had an equitable claim to relief, to apply to the chancellor.[3]

This decay of the equity administered by the common law courts, and the rise of the equity administered by the chancellor gives rise to two questions. Firstly, why did the equitable ideas and equitable doctrines, which were so marked a feature of the common law of the thirteenth century, gradually disappear? Secondly, what, if any, is the connection between those two phases in the early history of equity. These questions are closely connected, and can be conveniently considered together.

The root idea of equity is the idea that the law should be administered fairly, and that hard cases should so far as possible be avoided. This idea is common to many systems of law at all stages of their development.[4] It came very naturally to the mediæval mind which regarded the establishment of justice, through, or even in spite of, the law, as the ideal to be aimed at by all rulers. But this idea gradually disappeared from the common law because the common law had hardened too early into a rigid technical system. We shall see that during the fourteenth century the outlook of the judges became narrowed. The increasing number and technicality of the ordinary forms and processes of the common law tended to concentrate their attention upon the working and management of this complicated machinery.[5] They ceased to care so much for those larger principles which, in the thirteenth century, had made for rapid development. Moreover, they ceased to be so closely identified

[1] Bk. iv Pt. I. c. 2.

[2] "Per Egerton custodem magni sigilli, que il ad view un president en temps de R. 2 que l'ou la est tenant pur vie, le remainder pur vie, le remainder ouster in fee, per que le wast en le primer tenant pur vie est dispunishable per le common ley: uncore ad estre decree en Chancery per l'advice des Judges sur complaint de cestuy en remainder en fee, que le primer tenant ne faira wast, et injunction la grant" (1559), Moore, K.B. 554, pl. 748.

[3] Last note.

[4] Pollock, The Transformation of Equity, Essays in Legal History 287-290.

[5] Below 524-525, 554, 591-597.

with the person of the king that they could assume his prerogative to administer equity. That prerogative naturally came to be administered by those courts and officials who acted as the more immediate agents of the king.

Thus the equitable principles which we can discern in the common law right down to the beginning of the fourteenth century gradually evaporated. It was this fact which made the intervention of the chancellor necessary. No doubt both the equity of the common law courts and the equity of the chancellor are both ultimately traceable to the theory that the king must do justice—even though he interfered with the strict rules of law. No doubt in the twelfth and thirteenth, as in the fourteenth and fifteenth centuries, the king administered this justice through the Council and the courts immediately connected therewith. But, whereas in the twelfth and thirteenth centuries, the King's Bench and the Eyre were closely connected with king and Council; in the fourteenth and fifteenth centuries the Eyre had ceased, and the King's Bench had lost its close connection with king and Council.[1] This peculiarly royal justice, therefore, came to be administered by the chancellor, who from that day to this has always been closely connected with the king, and in the Chancery. Thus it was through the Chancery, and not through the common law courts, that the stream of equity now flowed. No doubt some of the equitable ideas, which had appeared in the common law courts in the thirteenth century, reappeared in the Chancery—they had a common ancestor in king and Council. It may even be that the chancellor took some hints from the equitable rules once administered by the common law courts. In a case where it was obviously fair that similar relief should be given, the equity administered by the chancellor naturally followed the lead given by the law.[2] But, because these equitable ideas flowed through the channel of the Chancery, they were worked up into a technical system under influences and by machinery, which were very different from the influences which affected them and the machinery by which they were administered, when they flowed through the channel of the common law courts. The rules evolved in the Chancery were shaped partly by antagonism to the rigidity of common law rules; partly by ideas as to the function of conscience in determining the morally right, and therefore the equitable rule, which were borrowed from the canon lawyers;[3] partly by a procedure, quite different from the common

[1] Vol. i 210-211, 272.

[2] Thus Ashburner, Principles of Equity 494 n. d, suggests that the writ of Estrepement (above 248-249) may have formed the model for the injunction; cp. Hazeltine, Legal Essays 277.

[3] Bk. iv Pt. I. c. 4.

law procedure, which enabled the chancellor to ascertain what was the equitable course to take in each particular case. For these reasons equity as developed by the chancellor took a shape very different from the shape which equity would have taken if it had been developed in the common law courts. The equity developed by the chancellor cannot therefore be regarded as a continuation of the equity administered by the common law courts. It is a new, a distinct, and an independent development.

The Land Law.

I am here concerned with the land law as it was administered in the royal courts. With land held by unfree tenure, and with the closely connected subject of villeinage, I shall deal when I come to treat of the law administered in the local courts.

In the reign of Edward I. the land law was becoming more and more distinctly simply the law of property. The law was feudal—it was based upon tenure; but the governmental and jurisdictional elements in it were becoming eliminated. We have seen that the feudal jurisdiction which still survived to the lords of land was of very little use to them.[1] The lawyers of Edward I.'s reign held to the view that jurisdiction ought not to be regarded as alienable property.[2] The most important kinds of jurisdiction had become royal; and when we see that the aid of the king was invoked to assist a lord to exercise the jurisdiction dependent on tenure it is clear that it has ceased to have any value.[3] The custom of beginning actions in the royal court by the insertion in the writ of the words "quia dominus remisit curiam" was becoming common form.[4] But though the jurisdiction of the greater lords, temporal and spiritual, had decayed, they were still the largest landowners in the country. Their influence, though no longer exercised in their own courts, was still decisive. And it was still exercised; but it was exercised by means of statutes which, recognizing that the land law was now property law, secured great advantages to these magnates, and, like other

[1] Vol. i 178-179.

[2] R.P. i 98—De Warennis, Mercatis et Feriis—"Secundum opinionem quorundam de Consilio Regis dicatur, quod tales libertates Dignitati Regie et Corone sue annexe, que specialiter per concessiones Regum aliquibus conceduntur, tenend' sibi et heredibus suis, per ipsos quibus conceduntur, aut eorum heredes, non possunt in aliam personam transferri"—if the tenements to which these liberties are annexed are transferred "Dignitati Regie accrescunt."

[3] R.P. i 47 no. 20, "Robertus de Scales, qui habet quosdam tenentes qui ei scutagia sua reddere contradicunt, petit quod tenentes sui distringantur;" vol. i 178.

[4] Vol. i 178; Y.B. 30, 31 Ed. I. (R.S.) 4, "In a writ of right, 'because the lady had waived her jurisdiction therein,' the tenant proposed to aver that the tenements comprised in the writ were holden of such a one and of his fee, and not of the lady: and it was not allowed;" cp. ibid 232—a case in which c. 24 of Magna Carta was unsuccessfully urged.

statutes of this reign in other departments of law, fixed the main lines of the development of our land law for many centuries.

The list of the free tenures has become fixed. Lands held by free tenure are held either by knight service, frank-almoin, serjeanty grand or petit, or socage.[1] With the increase in the tendency of the land law to become simply property law it is the money rent characteristic of socage tenure which becomes the most valuable service till, in the following period, changes in the value of the money will render these fixed payments trivial. The other services will tend either to be commuted for money payments or to become obsolete. But the great lords who, from their position in Parliament, were able to exercise great influence upon the land law, had many military tenants. If the services of these tenants ceased to be valuable they must look to other sources of profit. These they found in the incidents of tenure—aids, relief, escheat, wardship, marriage.[2] It is the value of these incidents of tenure which, more than any other single cause, has shaped the course of Edward I.'s legislation upon the land law. To this cause we may certainly trace two statutes and possibly one important rule of English law. We shall see that in the sixteenth and seventeenth centuries the influence of these incidents in the shaping both of legislation and the development of legal doctrine was almost as great.

The statute of Quia Emptores[3] settled that all free tenants (other than tenants in chief of the crown) should be able to alienate their lands freely; but that if they alienated them for an estate in fee simple,[4] the alienee should hold, not of the alienor, but of his lord. This meant that the services as well as the incidents all went to the chief lord. Indirectly through the encouragement thereby given to dealings with land, the statute has led to the gradual decay of mesne tenure. The statute De Viris Religiosis[5] owes its origin even more directly to the same cause. If a man gave land to a religious corporation, i.e. made an alienation in mortmain, the lord got a tenant who never died, who was never under age, who could never marry, who could

[1] Vol. iii 34-54. [2] Ibid 54-73.

[3] 18 Edward I. c. 1. The first words of the statute make its object clear—"Quia Emptores terrarum . . . de fœdis *magnatum* et aliorum . . . quibus libere tenentes eorundem magnatum et aliorum terras . . . vendiderunt, tenenda in feodo sibi et heredibus suis de feoffatoribus suis et non de capitalibus dominis fœdorum, *per quod iidem capitales domini escaetas, maritagia, et custodia terrarum . . . sæpius amiserunt* . . . Dominus Rex in Parliamento suo . . . ad instantiam magnatum . . . concessit," etc.

[4] Ibid c. 3; Y.B. 21, 22 Ed. I. (R.S.) 641.

[5] 7 Edward I. stat. 2 c. 3; 13 Edward I. c. 32—directed against the evasion of the first statute by fictitious lawsuits; for an example of its working see Ramsey Cart. ii pp. 110-115; Y.B. 30, 31 Ed, I. (R.S.) 535, 536,

never commit felony. The religious corporation suffered none of those incidents in the life of the natural man which were profitable to the lord;[1] and therefore it was enacted that no alienation should be made to these corporations without the licence of the lord and the crown. It is possible that the rule of law which makes land descend to all a man's daughters equally as coparceners is due to the same cause.[2] The value of the incidents made it more profitable to the lord to keep all the daughters as his immediate tenants, rather than to follow the older custom of having only the eldest daughter as his immediate tenant, and leaving the younger daughters to hold of their eldest sister.[3] The result was to give a precision to the rights of the younger sisters which made it clear that they were really co-owners of the property.

It is clear, therefore, if we look at the free tenures and their incidents, that the law is becoming modified by the fact that land tenure is coming to be regarded from a commercial rather than from a political point of view. It is semi-feudal rather than feudal; and for this reason the centre of legal interest is shifting from the rules about tenure to the rules about the kinds of interest which a man may have in lands held by free tenure.

The list of interests which a man can have in land held by free tenure is nearly fixed. In Bracton's day interests in fee simple and for life were well known.[4] In this reign it was settled that a gift to a man and his heirs (whether or no assigns be named) gives a fee simple,[5] and legislation and decided cases upon the subject of waste were fixing the nature of the interest of the tenant for life.[6] But in Bracton's day the conditions and the limitations which a donor could impose by the form of his gift were very uncertain.[7] We shall see that these conditional gifts had been interpreted by royal judges with a bias in favour of free alienation in such a way that they defeated the intentions of the donors.[8] These donors procured the passing of the statute

[1] These consequences might sometimes be evaded by express agreement, e.g. that a relief should be paid when a new abbot succeeded, Ramsey Cart. i no. 91; Y.BB. 19 Ed. III. (R.S.) 394; 20 Ed. III. (R.S.) i 50, 52.

[2] Vol. iii 174-175.

[3] P. and M. ii 274-276; Britton ii 29, 40; Y.B. 32, 33 Ed. I (R.S.) 300, "Parceners ought not among themselves to destroy another's right of seignory."

[4] Above 262.

[5] Y.B. 33-35 Ed. I. (R.S.) 362 *per* Bereford, J., "We understand that the tenements were given to William and Agnes, and to the heirs and assigns of Agnes, and there is no force in that word *assigns*, but simply in those words *heirs* of Agnes."

[6] Statute of Marlborough (1267); Statute of Gloucester (6 Ed. I. c. 5); Y.BB. 21, 22 Ed. I. (R.S.) 28, 30; 30, 31 Ed. I. (R.S.) 480; vol. iii 121-123.

[7] Above 262; vol. iii 102-104.

[8] Ibid 112-114.

De Donis Conditionalibus[1] which created the interest in fee tail, and, incidentally, seems to have gone far to complete and to fix the possible interests which can be created in lands of free tenure. The direct object of the statute was to secure the interests of the issue and of the donor where land had been given to a man and the heirs of his body.[2] With that object in view the statute enacted that land should always descend "secundum formam in carta expressam" so that "illi quibus tenementum sic fuit datum sub conditione" should have no power so to alienate as to prevent the land from coming to their issue, or to the donor if issue failed. We shall see that, for some time after the passing of the statute, it was doubtful whether it applied so as to prevent alienation by the donee only—as the literal words would seem to imply, or whether it applied to prevent alienation by the donee or any of his heirs. Eventually the latter interpretation prevailed, and so the modern estate tail was created.[3] The Statute went on to provide appropriate remedies, called writs of formedon (*forma doni*), by means of which the lord could recover the land on the failure of issue,[4] or the issue could recover the land on the death of the ancestor.[5] The interest so created was called a fee tail because the descent of the fee was cut down (*talliatum*) to the heirs of the body of the donee. It soon became clear that the donor of such a fee had not granted out all that he had to give. He might therefore direct that the land should "remain" to another instead of "reverting" to himself. It was not long before a new writ of formedon in the remainder was invented to assist such a person.[6]

Thus we get in lands of free tenure interests in fee simple, in fee tail, and for life; we get, in cases where interests in fee tail or for life have been granted, interests in remainder or reversion. These interests are distinct from the purely tenurial right which the lord has to succeed by escheat if his tenant in fee simple dies without heirs.[7] It is owing largely to the fixity and definiteness of these interests that the common law arrived at its doctrine of "estates" in the land.

This peculiarly English conception of an estate in the land probably originates from two causes. (1) An immature system

[1] 13 Edward I. c. 1; vol. iii 114.

[2] Y.B. 15 Ed. III. (R.S.) 390 *per* Sharshulle, J., see also the preamble to the statute.

[3] Vol. iii 114-116.

[4] Formedon in the reverter.

[5] Formedon in the descender. As to whether these two writs existed before the statute, see vol. iii 17, 18; cp. also below App. Vd (16) p. 615 n. 4; see vol. iii App. Ia (2) for the writs.

[6] This writ is not given by the statute, but in Y.B. 33-35 Ed. I. (R.S.) 20 it is mentioned with the other writs of formedon.

[7] P. and M. ii 28 n.; vol. iii 67-68, 133.

of law has some difficulty in grasping the idea of a legal right apart from the thing over which that right exists. At the present day we know well enough that ownership means simply a bundle of rights. Early law regards it as control over a thing —hardly conceivable apart from that thing. The distinction, in fact, between a right and the subject of a right is a feat of abstraction of which it is quite incapable. Now it is no doubt true that it is only the tenant in possession who has a present right to the land. But clearly others have rights and actions to enforce them. The interests of those who hold in remainder or reversion are rights to get possession at a future time. Roman lawyers, and perhaps Bracton,[1] would have called them res incorporales. But, as we shall see, English law at this period has no clear idea of the distinct juristic character of res incorporales.[2] They are treated as if they were corporeal things; and thus this defect in the analytic faculty is one reason why English law has come by its doctrine of estates. These future rights to enjoy are treated as if they were actually existing things.[3] (2) There are a large number of different interests, recognised and protected by the law, which may coexist in the same piece of land at the same time. There may, as we have seen, be many different tenants holding by different tenures.[4] Likewise there may be many different tenants holding different interests—in possession, reversion, or remainder. The enjoyment of these interests in reversion or remainder may be postponed; but they are protected by appropriate actions, and they are as definite as the interests of the tenant in possession.[5] Some word was needed to express the interests of these various persons, and the word hit upon was "status" or "estate"—perhaps for the following reason: We have seen that in the older law the tenure by which the tenant held his land often told us something of his status.[6] The word "status" was an apt one to express a man's position with regard to land holding at a time when so many things turned upon land holding. As the differences between the types of free tenure tended to diminish in importance, the term comes to be applied to the quantum of the tenant's

[1] Above 264. [2] Below 355-357.

[3] For a good account of this peculiarity of English law see Markby, Elements of Law (third ed.) 163, 164.

[4] Above 260; Y.B. 33-35 Ed. I. (R.S.) 376 *Passeley* says, "We have heretofore learned that the tenant in demesne can hold in socage of his mesne, and his mesne hold by knight service of his lord paramount, and the lord paramount by serjeanty."

[5] Perhaps in Edward I.'s reign there was some doubt as to the alienability of a remainder, Y.B. 21, 22 Ed. I. (R.S.) 184-188.

[6] Above 264-265.

interest rather than to the quality of the tenant's tenure.[1] Thus, this term "status" or "estate," borrowed originally from public law and applied upon feudal principles to land tenure, becomes acclimatized in private law; and as land holding becomes more and more simply property law, it takes upon itself the new meaning of an interest in land. The term is so used frequently and constantly in the Year Books of Edward I.'s reign.[2]

Estates, then, in fee simple, in fee tail, and for life are the interests in land known to the law. We see several kinds of life estate—the husband's estate by the curtesy, the wife's estate in dower.[3] We see, too, some of the forms of co-ownership recognized by the common law—the estate of the coparcener, the joint tenant, and the tenant in common; but the two latter varieties are not as yet clearly defined.[4] The main lines of the law of inheritance are already drawn.[5]

The question of the conditions under which a tenant can freely alienate his land has been settled in almost its final form. Except in the case of tenants in chief of the crown,[6] and except in the case of tenants by serjeanty,[7] a tenant may freely alienate in his lifetime, but he can make no will of lands except by virtue of some special custom to devise.[8] The manner in which such alienation may take place is also clearly fixed. No alienation is valid unless there is actual transfer of possession.[9] The former tenant must quit the land and put the new tenant into possession.[10] A deed is of no avail except as evidence. A case of 1292 [11] illustrates this very clearly. "One Adam brought the Novel Disseisin against his elder brother. His brother said that he was never so seised . . . and prayed the Assise.—*The Assise* came and said that at a certain time there was one William who was tenant of that land for which he (Adam) brought the Assise,

[1] "The idea modern times annex to freehold or freeholder, is taken merely from the duration of the estate," *per* Lord Mansfield, Taylor v. Horde (1757) 1 Burr. at p. 108.

[2] See e.g. Y.B. 20, 21 Ed. I. (R.S.) 12, 34, 38, 50. In Y.B. 21, 22 Ed. I. (R.S.) 500 we have an instance of the use of the word in an older sense; the question at issue was whether certain persons were tenants in Ancient Demesne; *Metingham*, J., said, "It might be that they or their ancestors were immigrants *who changed their estate*, and that they were not of the blood of those who previously held of the king," etc.; below 353 n. 4.

[3] Vol. iii 185-197. [4] Ibid 126-128. [5] Ibid 171-185.

[6] Ibid 83-85; Y.BB. 22, 23 Ed. I. (R.S.) 38; 33-35 Ed. I. (R.S.) 306; R.P. i 54 no. 101—where a petition for a licence to alienate is refused because, "Rex non vult aliquem medium."

[7] Vol. iii 47; P. and M. i 315.

[8] Vol. iii 75-76, 271.

[9] See Y.BB. 20, 21 Ed. I. (R.S.) 210; 33-35 Ed. I. (R.S.) 50; 3, 4 Ed. II. (S.S.) 186.

[10] Fitzherbert Ab. *tit.* Assize pl. 418 (8 Ed. I.).

[11] Y.B. 20, 21 Ed. I. (R.S.) 80-83.

and who had two sons, John the elder and Walter the younger; and that in his last illness he determined to advance his younger son; and that the good man of his own free will caused himself to be led by the hand out of the house where he lay as far as the gate, and there had himself placed in a cart, and rode to C., and there entered the order of the black monks, and died three days afterwards. The son took seisin there, and remained in possession till his father died; and his attorney remained in possession after his father's death, until John the elder son came from L. and turned out the attorney and kept his brother out.—*Lowther.* Sir, all the father's goods and likewise his wife remained in the house until his death: therefore he died seised.—*The Assise* said that his goods were all taken out, and that his wife did not remain in the house, but went to reside in a house adjoining.—It was adjudged that he (the younger son) was disseised." Whether it is a question of conveyance, or whether it is a question between two rival claimants to land, the importance of the possession obtained by a man or his ancestors is paramount. The land law as it comes to be more and more simply property law tends to hinge more and more on questions connected with possession; and the question whether or not in any given case possession has been acquired soon begins to raise difficult and delicate questions of law.[1]

We have seen that in the preceding period Bracton borrowed from rules of Roman law to define the essence and consequences of possession.[2] But, as we shall see, the royal courts followed in this period, not the Roman law, but the older rules as to the possession of movables.[3] They drew no hard and fast line between possession and ownership. The man in possession is prima facie the owner, and can, while in possession, exercise all the rights of an owner. A man without any title, if in possession, can alienate; he can enfeoff another, and that other's possession the law will protect. A feoffment may have a "tortious operation." A man may have an estate in the land though he has no right to it.[4] The man out of possession has nothing but a right which, if he is very prompt, he may enforce by entry.[5]

[1] Below 354 n. 3; vol. iii 9.

[2] Above 282.

[3] Above 110-114; vol. iii 319-322.

[4] See especially the opinion of Auger de Ripon cited Y.B. 20, 21 Ed. I. (R.S.) xviii, xix, "Licet generaliter dicatur quod nullus potest mutare statum antiqui dominici nisi Dominus Rex vel dominus manerii; hoc est verum quoad servitium tenementi, et fallit quoad tenementum tenendum; quia status tener potest mutari: quia si sokemannus feoffat extraneum et ille extraneus eiiciatur, competit ei remedium per breve novæ disseisinæ, et sic mutatus est status tenementi;" cp. Y.BB. 20, 21 Ed. I. (R.S.) 268; 21, 22 Ed. I. (R.S.) 250; 33-35 Ed. I. (R.S.) 490.

[5] The cases cited from the Y.BB. by Maitland, L.Q.R. iv 287 show that there is no fixed time; it may be that Bracton's period of four days is being lengthened, but

But if he loses this right of entry he is left with but an inalienable right of action.[1]

It was, however, inevitable that these principles should take a new shape under the influence of the various real actions[2] which were open to the freeholder. In these actions the courts were frequently called upon to decide whether, on some given state of facts, a man had acquired or lost possession.[3] Thus they gradually built up a body of doctrine as to the possession of those things for which such an action lay—the things, that is, which could be classed under the term "free tenement." The term "seisin" will not for some time be exclusively appropriated to the possession of such things;[4] but the special sphere which the term "seisin" will occupy in later law is already beginning to be defined; and the definition of that sphere will give rise to the idea that what is protected is not possession as such, but possession of a freehold. This, as we shall see, will soon begin to carry with it some sort of hazy connotation of ownership or title, and will thus set in motion a process which will in time profoundly modify the meaning of the term "seisin."[5]

We can see that the position of the tenant for term of years is beginning to change. The increased protection given to him is beginning to make his interest look less like a personal right against his landlord and more like a real right.[6] His interest is

clearly three months is too long; as we shall see, below 583-585, the important matter is that the length of time is becoming one for judicial discretion, and that that discretion tended to lengthen the period within which the owner has a right of entry.

[1] Vol. iii 92.

[2] Above 261, 263; vol. iii 5-26.

[3] Y.BB. 20, 21 Ed. I. (R.S.) 256—a direction to the feoffee to take seisin was complied with; the feoffor then entered and enfeoffed another; when he directed the first feoffee to take seisin he was a league distant from the land; the court was puzzled as to who had seisin; 30, 31 Ed. I. (R.S.) 212—seisin for a day judged good enough for the real owner; ibid 140—one gave a power of attorney to give X seisin; but as he still remained on the land, X, though put in seisin, did not acquire seisin; for what will amount to a disseisin see Y.BB. 20, 21 Ed. I. (R.S.) 392, 406; 31, 32 Ed. I. (R.S.) 140; 32, 33 Ed. I. (R.S.) 232; in Y.B. 1, 2 Ed. II. (S.S.) 125, 126, it is said by *Howard*, J., "Seisin need not be so full in this case where they entered by judgment of the king's court as it ought to be in another case;" "the possession of a single foot suffices for a true heir," *per* Spigurnel, J., Eyre of Kent (S.S.) iii 92; and cp. Y.B. 11, 12 Ed. III. (R.S.) 530; see also Eyre of Kent (S.S.) ii 181; iii 41, 80, 94, 116, 122, 128, 138, for other instances where the court was asked to put a legal construction upon the facts found as to seisin and disseisin.

[4] Below 581 and n. 2.

[5] Maitland, L.Q.R. iv 37-39, citing Britton i 258, says, "We can make out that 'title' has now become essential to 'free tenement.' The plaintiff in the assize must have had 'title de fraunc tenement.' This he may have got by inheritance, by feoffment or the like, or again by peaceable seisin after a vicious entry. The law therefore no longer endeavours to protect possession against ownership; but it will protect even against ownership something that stands, as it were, midway between possession and ownership, some *tertium quid* that can only be described as 'title de fraunc tenement.'"

[6] Above 262; 6 Edward I. c. 11 protected him from ouster by means of collusive legal proceedings between his landlord and a stranger; vol. iii 214.

called a chattel in one of the Year Books of Edward I.'s reign.[1] This may show us that the law is beginning to recognize that he has a right in the land, different indeed from that of the freeholder, but real enough to entitle it to rank as personal property.

"The realm of mediæval law," says Maitland, "is rich in incorporeal things."[2] The seignory of the feudal lord, rents, annuities, corodies, franchises, offices, advowsons, rights of common and other profits a prendre, easements, all are incorporeal things.[3] What we must chiefly note is that all are treated in many ways like corporeal things. The law can understand a corporeal tangible thing: it has hardly as yet arrived at a clear conception of an intangible right. The distinction between corporeal and incorporeal is not ready made. It is the mark of a mature system of law. We may remember that the Romans included some servitudes in their list of *res mancipi*.[4] Though Bracton knew from his study of Roman law that there was a difference, though he ridicules as illiterate those who did not see it, it was long before it was generally perceived.[5]

In a feudal state where property and office are confused, under a primitive legal system which has a highly developed land law, but no theory of contract, the list of incorporeal things tends to expand, and to follow the most highly developed branch of the law. As Maitland has explained, the extensive powers which landowners possessed of granting to others such incorporeal things as rights of common, rights to take wood, rights to have board and lodging, covered the deficiencies of other branches of the law—notably the law of contract. "The man of the thirteenth century does not say, I agree that you may have so many trees out of my copse in every year; he says, I give and grant you so much wood. The main needs of the agricultural economy of the age can be met in this manner without the creation of any personal obligations."[6] All these rights are

[1] Y.B. 33-35 Ed. I. (R.S.) 165 *Bereford*, J., said, "The term is only a chattel, and belongs to the husband and not to the wife."

[2] P. and M. ii 123. [3] Vol. iii 137-157.

[4] Girard 362, "A l'époque la plus ancienne, où les rares servitudes prédiales existant déjà étaient à peu près confondus avec la propriété de la fraction du sol sur laquelle elles s'exercaient, les modes d'acquisition de la propriété devaient être les modes mêmes d'acquisition des servitudes;" we shall see that this is strikingly true of English law, vol. iii 96-101.

[5] f. 53, "Si quis fundum habuerit, ad quem pertinet advocatio ecclesiæ, jus præsentandi pertinebit ad dominum, et quamvis ecclesia, secundum quod construitur lignis et lapidibus, sit res corporalis, jus tamen præsentandi erit incorporale, et unde aliud est dare ecclesiam et aliud dare advocationem. Laici tamen, secundum communem usum, propter eorum simplicitatem, dant ecclesias, quod nihil aliud est dicere, quam præsentare;" see generally vol. iii 140.

[6] P. and M. ii 145; for instances of curious incorporeal things see the Eyre of Kent (S.S.) iii 96—assize of novel disseisin for the office of custodian of the great gate of the Archbishop of Canterbury's palace; ibid 124-125—an office of serving

treated as things. The remedies of the freeholder, the estates of the freeholder, devolution after death, the liability to perform services, the need to get livery of seisin, reappear in the law relating to these incorporeal things. In later law incorporeal things came to differ from corporeal in the fact that they lay in grant and not in livery.[1] Bracton, borrowing from Roman sources, had stated this rule in Roman form; but it was long before it came to be the rule of English law.[2] It was certainly not generally true in the thirteenth century.[3] Even when it was recognized that a deed of grant was sufficient for their creation, the man who had not got seisin of them by exercising the right was very insufficiently protected.[4] Again we shall see that the law came to recognize that certain of these incorporeal things could be acquired by positive prescription. Such positive prescription was never allowed in the case of corporeal hereditaments, nor for all incorporeal hereditaments.[5] These two distinguishing features come to mark off in a somewhat uncertain fashion corporeal hereditaments from some of the incorporeal. They have hardly begun to do so in the thirteenth century.

In fact, the incorporeal things known to English law have always been and still are a miscellaneous list, both because they took their origin in a primitive stage of legal development and in a feudal society, and because the list was compiled in an age when the land law was the most important part of the law. The growth of a law of contract will take away the importance of some items in the list. A changed order of society will make other items, such as franchises or offices, merely antiquarian curiosities. Others, such as easements and profits a prendre will in course of time be definitely fixed in number, and become the "servitudes" of English law. To the end there will be things as to the corporeal or incorporeal nature of which it will be pos-

writs in return for certain rations of bread and beer; and cp. Y.BB. 11, 12 Ed. III. (R.S.) 454; 18 Ed. III. (R.S.) 378; we have in Ramsey Cart. ii no. 452 a grant in frank-almoin of three bushels of salt yearly; Madox, Form. no. 544—Walter Pigot grants to Lord Radulph and his heirs the right to take millstones for his mill at 4d. a pair; that certain of his cattle may use a pasture of the grantor; quiet enjoyment of certain enclosures made by the grantee; the right to make a certain enclosure, the boundaries of which are defined, to keep his beasts; "an Act to make the sum of five marks payable by the abbott and convent of Barking to be parcell of the manor of Havering," 7 Henry VII. c. 14, is a good illustration of the survival of this set of primitive ideas.

[1] Vol. iii 98-99.

[2] Bracton f. 39b, "Res incorporalis non patitur traditionem;" L.Q.R. v. 29; cp. Y.B. 21, 22 Ed. I. (R.S.) 608 with Y.B. 14 Ed. III. (R.S.) 414.

[3] Vol. iii 97-98; Y.B. 33-35 Ed. I. (R.S.) 50, Scoter says, with regard to an advowson, "Ink and parchment without delivery and acceptance do not make a presentation."

[4] Vol. iii 100-101.

[5] Ibid 166-171.

sible to dispute;[1] and we cannot doubt but that this is due to the fact that some of the ideas of a primitive stage of legal development became stereotyped in our law. As we have seen, the doctrine of estates arose at a time when the difference between a right and the subject of a right was imperfectly apprehended. Many interests in land which the Roman lawyers would have classed as *res incorporales* are in English law existing estates in the land.[2] Primitive materialism has subtracted much from the department of incorporeal things and added it to the department of corporeal things. Here as in other branches of the law the technical working out of ancient rules has produced a wholly original legal conception.[3]

The Criminal Law and the Law of Tort.

By no means all the offences punishable by law were dealt with by the royal courts. We shall see that many of the smaller offences were dealt with by the local courts of various kinds;[4] and, as we have seen, many offences afterwards taken over by the royal courts were, at this period, dealt with by the ecclesiastical courts.[5] But already a certain number of the more serious offences fell within the jurisdiction of the royal courts, and were disposed of either by criminal or by civil processes.[6] We begin therefore to see in outline some of the features which will be characteristic of our criminal law. We see also the rise of a semi-criminal action—the action of trespass—which will contribute to the creation of the misdemeanours of our criminal law, and will, with its offshoots, dominate not only our law of tort, but also, in process of time, the greater part of the field of common law jurisdiction.

Our criminal law of the present day divides crimes into treasons, felonies, and misdemeanours. The law of Edward I.'s reign had not distinctly defined the offence of treason; and it did not know the misdemeanour. But it had arrived at the conception of felony; and we can see the beginnings of the process which will lead ultimately to the received classification of crimes.

The more serious offences of which, as we have seen, the royal courts had long taken cognizance, had become known as felonies. The word "felony" is probably derived from the Latin *fell*, or *fel*, meaning gall. It comes to mean, therefore, an offence which is venomous or poisonous.[7] Abroad it was used to signify

[1] E.g. reversions and remainders, P. and M. ii 124.
[2] Above 350-352. [3] Above 196; below 405.
[4] Below 381-383, 389-391. [5] Vol. i 620, 621. [6] Above 256-257.
[7] P. and M. ii 463, and references to the Oxford English Dictionary there cited; Y.B. 20, 21 Ed. I. (R.S.) 352 *Metingham*, J., says that "felony is such a poisonous

those offences which involved a breach of the obligations existing between lord and vassal.[1] The rule that the felon's land escheated to his lord shows that English law was not uninfluenced by this idea. And we shall see that the same idea was present at a later period in the view which English law took of treason.[2] But in English law the word has an extended meaning. It is a general word which covers all the more serious crimes which, being breaches of the king's peace, fell within the jurisdiction of his courts.[3] This extension is, as Maitland has pointed out,[4] very significant of the manner in which common law has been developed. "All the hatred and contempt which are behind the word *felon* are enlisted against the criminal, murderer, robber, thief, without any reference to the breach of the bond of homage and fealty." No doubt the feudal lords did not object to an extension which brought them more escheats; but, "this extension of felony, if it might bring them some accession of wealth, was undermining their power."[5]

Felony, then, comprised in the reign of Edward I. such offences as homicide, arson, rape, robbery, burglary, and larceny.[6] All these offences might be prosecuted either at the king's suit by way of indictment, or at the suit of the individual by way of appeal; they all involved forfeiture of life or limb; a man accused of these offences might be outlawed; the felon's goods belonged to the crown, and his lands were forfeited to the crown for a year and a day, and then escheated to his lord.

We shall see that the scope of some of these felonies was wide. Killing in execution of a lawful sentence of a court, or in the arrest of an outlaw or manifest thief, was justifiable.[7] But all other cases of killing were strictly speaking wrongful, though not necessarily felonious. Newer ideas as to criminal responsibility were, however, emerging in the rule that persons of tender age could not be held guilty of felony;[8] and in the practice of

thing that it spreads its poison on all sides;" so Y.B. 21, 22 Ed. I. (R.S.) 354 *per* the same judge; Eyre of Kent (S.S.) iii 49 we get the practical deduction from this conception—Scott *arg.* says, "Felony is so heinous a thing that it attaints the blood, so that no right can descend to another through a felon's blood."

[1] P. and M. i 284; it bears this meaning in Leg. Henr. 43. 7, and in other passages.

[2] Below 449-450.

[3] P. and M. ii 463—the word is used thus generally in the assize of Northampton c. i.

[4] Ibid i 285. [5] Ibid ii 464.

[6] Ibid ii 464. Wounding, mayhem, and imprisonment were about this time ceasing to be regarded as felonies, ibid 509.

[7] Northumberland Assize Rolls (Surt. Soc.) 94; Y.B. 30, 31 Ed. I. (R.S.) 512; Bracton's Note Book case 1084; vol. iii 311-312, 608.

[8] Y.B. 30, 31 Ed. I. (R.S.) 510, *per* Spigurnel; Parlt. Roll 1305 (R.S.) no. 470; vol. iii 372. Though it is laid down that a child under seven cannot be guilty of felony there is in the Register of Writs (f. 309b) a precedent of a pardon to a child under seven.

giving to persons who killed by misadventure or in self-defence, or who were of unsound mind, pardons which in later law will be pardons as of course.[1] It should be noted, however, that these persons still needed pardons, and that these pardons did not free them from the possibility of an appeal at the suit of the injured person or his kin;[2] and we may remember that the rules as to deodands were still in force. The various principles of law, old and new, and the rules of practice have not as yet resulted in any distinct classification of the different kinds of homicide. The term "murdrum" still meant that secret homicide for which the murder fine was payable.[3] The term "manslaughter" has not yet appeared.

Britton mentions the crime of burglary.[4] The offence is committed by those who feloniously in time of peace break churches, or houses of others, or the walls or gates of cities or boroughs. It does not as yet seem necessary that it should be committed by night. It probably represents the older hamsoken. Robbery and mere theft in Glanvil's day were distinguished by the fact that the former was a plea of the crown, the latter a plea of the sheriff. At this period both were felonies.[5] But in the case of theft a line was drawn between grand larceny and petty larceny. If the thing stolen were not worth twelve pence, the offence was petty larceny and no felony.[6] We can see that the essence of theft was already the wrongful taking of a thing out of another's possession. Though Bracton had said that the *animus furandi* was essential,[7] the difficulty of proving this intent sometimes led at this period to the neglect of this essential element.[8] Here, as in other cases, Bracton was before his time in his insistence upon the ethical element in crime. The doctrines which he derived from the canon law were too civilized for the immature fabric of the common law.[9]

[1] Vol. iii 312-313.

[2] Y.B. 30, 31 Ed. I. (R.S.) 514, "If a man be indicted for the death of another, and in respect thereof purchase the king's charter, and produce it before the justices in Eyre, it shall be asked if there is any one who will sue for the felony, then or never."

[3] Vol. i 15; vol. iii 314.

[4] i 42; vol. iii 369.

[5] P. and M. ii 493, "Larceny became a plea of the crown under cover of a phrase which charged the thief with breaking the king's peace; to all appearance it was the last of the great crimes to which that elastic phrase was applied;" for the advantages of suing in this case by way of appeal see below 361.

[6] Vol. iii 366-367; this is an old rule, see Leg. Henr. 59. 20.

[7] f. 150b.

[8] Y.B. 33-35 Ed. I. (R.S.) 502 *Mallore*, J., says, "I saw a case . . . where one R., because his rent was in arrear, took his farmer's corn and carried it off, and disposed of it at his pleasure, and he was hung for that deed." *Malbersthorpe*—"It is not to be wondered at."

[9] Above 258-259 for his views as to deodands; f. 105b he says, "Crimen vel pœna paterna nullam maculam filio infligere potest"—but English law for many centuries knew the doctrine of corruption of blood as a consequence of a conviction of felony.

The offence of treason was not yet, as I have said, clearly distinguished from felony. In later law it will always be a felony—and something more. At this period it seems to be regarded simply as an aggravated kind of felony. We have seen that the term "felony" was applied abroad to offences which involved a breach of the vassal's obligation. A breach of the obligation of allegiance to the king will in later law be the essence of treason. Under the influence of Roman law, forgery of the king's money and his seal was included. But the attempts on the part of the king to extend the law of treason, the distinctions drawn between treason and simple felony, and the settlement of the boundaries of treason by statute, belong to the following century.[1]

Though there is nothing as yet answering to the misdemeanour of our modern law, we can see some of the causes which will lead to its growth. We have seen that the procedure by way of indictment was growing, while that by way of appeal was decaying.[2] The technical nicety required in pleading,[3] the possibility of trial by battle,[4] the hostility of judges to a form of procedure which was often used simply from hatred and malice, were the causes of this decay.[5] The chances of success were doubtful; and if the appellee were found to be innocent there was the certainty of amercement and imprisonment.[6] But a system of criminal law must rest to some extent upon the natural desire of mankind to avenge a wrong. If justice is to be done the law must, as we have seen, provide some procedure which will enable the injured person to come forward and obtain a remedy for himself.[7] Up to this period the old appeals had supplied this need. But at the end of the thirteenth century the action of trespass provided a new and efficient substitute for them. The procedure by way of appeal was therefore attacked, so to speak, on two sides—by the indictment on the one side and by the action of trespass on the other. It is not surprising to find that

[1] Below 449-450; vol. iii 287-293. [2] Above 256-257.

[3] See e.g. R.P. i. 122, the appellees get judgment because, "Certa sunt verba in Curia Domini Regis statuta per quæ fieri debent appella, et per quæ appellator prosequi debet et narrare in appello suo; et prædicta Agnes (the appellor) nihil narrat versus eos." Cp. Eyre of Kent (S.S.) 101-102.

[4] Britton i 123.

[5] Above 256-257; and they took the same view in the fifteenth century, see Plumpton Corr. (C.S.) 35.

[6] 13 Edward I. st. 1 c. 12.

[7] Above 257; it was still the common practice, if the appeal were quashed, to arraign the appellee at the king's suit, ibid; R.P. i 122; Y.BB. 30, 31 Ed. I. (R.S.) 520; 18, 19 Ed. III. (R.S.) 50; Eyre of Kent (S.S.) i 111, 118; the same thing happened if the appellor abandoned his suit, Y.BB. 20, 21 Ed. I. (R.S.) 396; 30, 31 Ed. I. (R.S.) 496; Eyre of Kent (S.S.) i 106. The need to encourage the injured person to come forward was also met by the growth of the criminal information to the Council; and this later influenced the criminal procedure of the common law; see Select Cases before the Council (S.S.) xxxvi-xxxvii.

it showed marked signs of decay. Before speaking of the new action of trespass, I shall briefly sum up its later history.

Like many another anachronism the criminal appeal lived long in the law because it had been forgotten.[1] Appeals of treason brought in Parliament were abolished in 1400.[2] Hawkins thought that even after that statute it was possible to bring such appeals in the ordinary courts; but he admits that when he wrote (i.e. early in the eighteenth century) they had long been obsolete.[3] Appeals of robbery and larceny remained practically useful remedies till 1529, because no restitution of the stolen property could be had unless the thief or the robber had been convicted on an appeal.[4] They disappeared when a statute, passed in that year, gave a writ of restitution in cases where the criminal had been convicted upon an indictment, provided that the owner had given evidence or otherwise procured the conviction.[5] After some conflict of opinion[6] it was settled in the latter part of the seventeenth century that the owner could get restitution even as against a purchaser in market overt.[7] Appeals of rape were abolished by the Statute of Westminster I. (1275), but were apparently revived by the Statute of Westminster II. (1285).[8] We hear nothing of them after the fifteenth century.[9] For appeals of injuries under the degree of felony, the action of trespass was fast becoming a substitute in Edward I.'s reign. Britton recommends a recourse to this action rather than to an appeal.[10] But it was still optional to the plaintiff to allege felony and to bring the appeal; and such an appeal was certainly brought in Edward III.'s reign.[11] No doubt Britton's advice was usually followed; but Coke, Hawkins, and Blackstone consider that such appeals were still possible in their day, if the damage amounted to mayhem, and if it had been intentionally inflicted.[12]

[1] See generally on this subject Hawkins, P.C. Bk. ii chap. 23; Reeves, H.E.L. ii 421-423; iii 38, 39; Stephen, H.C.L. i 247-250.

[2] 1 Henry IV. c. 14.

[3] P.C. ii 161 (ed. 1724).

[4] Fitz., Ab. *Corone* pl. 27, 392.

[5] 21 Henry VIII. c. 11, "In like manner as though any such felon . . . were attainted at the suit of the party in appeal."

[6] Kelyng 35-36, 48.

[7] Hale, P.C. i 542-543.

[8] 3 Edward I. c. 13; 13 Edward I. c. 34; Hawkins, P.C. ii 172.

[9] Hawkins, P.C. ii 175.

[10] i 123, 124; it was especially advantageous in that the benefit of clergy still held in the appeal, but not in the action, 3 Henry VII. c. 1; Armstrong v. Lisle (1697) Kelyng 93; cp. Pike, History of Crime i 212; and on the whole subject see Y.B. 18 Ed. III. (R.S.) lv-lix, and references there cited.

[11] Y.B. 18 Ed. III. (R.S.) 130—the procedure was the same as if it had been an appeal of felony, ibid lviii, lix.

[12] For an instance of such an appeal see 19 Henry VII. c. 36, R.P. vi 550 no. 34; see also Third Instit. 313; Co. Litt. 127; Hawkins, P.C. ii 157, 158; Bl. Comm. iv 310—in spite of the fact that mayhem is admitted by him to be under the degree of felony; Y.B. 19 Ed. III. (R.S.) 226, it is said that as a result of this appeal only damages will be got. The relation of the appeal of mayhem to the action of trespass

It is the appeal of murder which has had the longest history. Many of the rules regulating it recall such primitive bases of the criminal law as the blood feud and the wergild;[1] and such features no doubt recommended it to the turbulent and litigious fifteenth century. Fitzherbert tells us that in 1482 all the judges resolved that a person indicted for murder should not be arraigned within the year, so that the suit of the party might be saved.[2] This rule was changed in 1487;[3] but it was nevertheless provided that acquittal on an indictment should be no bar to an appeal; and that, after such acquittal, the accused should remain in prison for a year and a day, in order to see whether any of the relatives wished to begin an appeal. As modified by this statute the appeal of murder existed till 1819; and a thin stream of cases, in which such appeals were brought, reported both in the regular reports[4] and elsewhere,[5] shows that it was not entirely disused. Holt, C.J., in 1701 called it "a noble remedy and a badge of the rights and liberties of an Englishman;"[6] and when, in 1774, an attempt was made to abolish it by statute, Burke opposed the proposal, and Dunning denounced it as an attempt to overthrow "a pillar of the constitution."[7] In fact there were two sets of reasons why the appeal of murder had so long a life. In the first place, we shall see that it was for some time thought that, if felony was committed, any civil right of action which might belong to persons injured by the felony, was merged in the felony; and that, even after this view

was discussed in Y.B. 12 Rich. II. 147-149; it seems to have been thought that the fact that an appeal was brought was no bar to an action of trespass, but the converse proposition seems to have been considered doubtful; it was, however, adjudged in Hudson v. Lee (1589) 4 Co. Rep. 43a that a recovery in trespass was a bar to an appeal of mayhem; and see Hawkins P.C. Bk. ii 159.

[1] E.g. the rules as to the relations of the deceased who were entitled to bring the appeal, see Y.BB. 32, 33 Ed. I. (R.S.) 192; 20 Hy. IV. Trin. pl. 25; 17 Ed. IV. Pasch. pl. 1; Hawkins, P.C. ii 163-166; a woman could only sue an appeal for rape or for the death of her husband, Bracton f. 148b, though this rule was questioned by Bereford, C.J., in 1313-1314, Eyre of Kent (S.S.) i lxxx-lxxxi, 114-121; but it would seem that there was some authority to show that if a woman did bring an appeal for any other cause, and the accused did not appear, he could be outlawed, ibid; no doubt this rule was made to secure the presence of the accused that he might be indicted, above 360 n. 7.

[2] Fitz., Ab. *Corone* pl. 44 (Mich. 22 Ed. IV.); vol. iii 315.

[3] 3 Henry VII. c. 1, "the party is ofttimes slow, and also agreed with, and by the end of the year all is forgotten."

[4] Lisle's Case (1697) Kelyng 85; Spencer Cowper's Case (1699) 13 S.T. 1190; Wilmot v. Tyler (1702) 1 Ld. Raym. 671; the cases of Bambridge and Corbet (1730) 17 S.T. 395, 397; Bigby v. Kennedy (1770) 5 Burr. 2643, and cases there cited; Ashford v. Thornton (1818) 1 B. and Ald. 405.

[5] There are a number of references to such appeals in Luttrell's Diary—see i 403 (1687); ii 214 (1691), 498 (1692); iii 30 (1692-1693)—S.C. 12 S.T. 950, an appeal threatened by Mrs. Mountford against Lord Mohun; iii 308 (1694); iv 255 (1697), 641 (1700); for two cases of 1724 and 1729 see below 363.

[6] Rex v. Toler 1 Ld. Raym. at p. 557.

[7] Lea, Superstition and Force 245.

was proved to be erroneous, it still survived, in cases where the felony had caused the death of another, in the changed shape of the thoroughly irrational rule that the death of a human being cannot give rise to any civil right of action.[1] The appeal of murder gave the relatives of a murdered man a chance to get something from the murderer by the threat to bring an appeal. There is evidence that in Edward III.'s reign the threat of an appeal was thus used to get compensation;[2] in the edition of West's Symboleography[3] published in 1615 there are two precedents of agreements, one by a wife[4] and the other by a brother,[5] not to prosecute an appeal of murder; there is some reason to think that the numerous cases of these appeals of which we read in Luttrell's Diary in the late seventeenth and early eighteenth centuries, but which never got into the reports, were brought with a similar object;[6] and in 1770 the widow of John Bigby brought an appeal against his murderers, Mathew and Patrick Kennedy, which was compromised for a payment of £350.[7] In the second place, such a threat was effective because, though either an acquittal or a conviction on an indictment was a bar to the other appeals of felony, neither an acquittal nor a conviction for murder was, by reason of the express provisions of the statute of 1487, a bar to an appeal of murder.[8] Therefore an appeal was still open to the relatives of the deceased, whatever the results of the trial. Now a verdict of an acquittal, however just, does not always satisfy the relatives of the deceased. This cause produced the appeals in the case of Lewis Houssart in 1724 and James Clough in 1729, in both of which a conviction was secured on the appeal after a verdict of acquittal on an indictment, and in both of which the appellees were executed.[9]

[1] See vol. iii 331-336 for the history of these rules.

[2] Hist. MSS. Com. Fifth Rep. X, and App. 369, there is a pardon in which (as was usual) the right of the relatives to bring an appeal was reserved; and there is a deed extant which shows that in this case the murderer paid money to the widow of the deceased to buy off her right to appeal him of the death of her husband.

[3] For this book see Bk. iv Pt. I. c. 5.

[4] Pt. I. § 169.

[5] Ibid § 474.

[6] Above 362 n. 5.

[7] References to this case will be found in the Annual Register for 1770 pp. 74-75, 75-76, 84, 91, 92, 103, 109, 118, 161; the murderers had been convicted, but their sentence had been commuted to transportation.

[8] Hale, Pleas of the Crown ii 249, 257; 3 Henry VII. c. 1; but a conviction for manslaughter on an indictment for murder was a bar, Armstrong v. Lisle (1697) Kelyng 93.

[9] These cases are reported in a book entitled "Select Trials for Murder, etc., at the Sessions House in the Old Bailey," published in 1734-35. Houssart's Case is in vol. i 399, and Clough's in vol. ii 282. In the first case the prisoner was appealed by his wife's brother for the murder of his wife. The first appeal was abated for false Latin. On the second appeal it was pleaded among other things that the pledges for the prosecution, John Doe and Richard Roe, did not exist, on which proof was given that John Doe, a weaver, and Richard Roe, a soldier, were living in

It also produced the appeals in the cases of *Lisle*,[1] *Spencer Cowper*,[2] and *Bambridge and Corbet*.[3] In the first of these cases the appeal was held not to lie as the appellee had been convicted of manslaughter and had had his clergy, and in the last two there was an acquittal. The last case, *Ashford v. Thornton*,[4] arose from the same cause. In that case the appellee was unwilling to risk the verdict of a jury, and, being better advised than Houssart or Clough, threw his glove down in court, and challenged the appellor to battle. The result was that both trial by battle and the appeal of murder were abolished in the following year (1819).[5]

We must now turn to that "fertile mother of actions"—the action of trespass.[6]

We hear of an action of trespass in John's reign; and there are some few instances of it in Bracton's Note Book. In one case an action so begun appears to have ended in the Grand Assize;[7] but generally the court rigidly set its face against using the action to try questions of title to land.[8] The numerous real actions were proper for that purpose, and should be used. The action became common at the end of the reign of Henry III., just after the conclusion of the Barons' War. "This may suggest to us," says Maitland,[9] "that in order to suppress and punish the recent disorder a writ which had formerly been a writ of grace, to be obtained only by a petition supported by golden or other reasons, was made a writ of course—an affair of every-day justice. Such MS. registers [of writs] as I have seen seem to favour this suggestion. I have seen no register of Henry III.'s reign which contains a writ of trespass, and it is not to be found even in all registers of his son's reign." This action was in Edward I.'s reign a quasi-criminal proceeding, i.e. though it was a proceeding begun at the suit of the injured individual, it was aimed at serious and forcible breaches of the peace,[10] and it ended in the punishment of the defendant as well as in com-

Middlesex. He was convicted and hanged, "unpitied even by the mob." In the second case the appeal also was brought by the murdered woman's brother. I owe all this information to Sir Richard Harington.

[1] (1697) Kelyng 89.
[2] (1699) 13 S.T. 1190.
[3] (1730) 17 S.T. 395, 397.
[4] (1818) 1 B. and Ald. 405.
[5] 39 George III. c. 46.
[6] See generally for the early history of the action Maitland, H.L.R. iii 177-179.
[7] Case 835; cp. Y.B. 32, 33 Ed. I. (R.S.) 58.
[8] Case 378; vol. iii 26, 28 n. 3.
[9] H.L.R. iii 178.
[10] See e.g. Bracton's Note Book case 1121. The allegation is that the defendant came "cum gente armata circiter ducentis hominibus venit ad prædicta maneria et blada ita asportavit;" and cp. Y.B. 32, 33 Ed. II. (R.S.) 316-320; but as early as 1310 the allegation of "force and arms" is coming to be regarded as common form, Y.B. 3, 4 Ed. II. (S.S.) 29.

pensation to the plaintiff.[1] Its advantages over the appeal of felony were marked. The same nicety of pleading was not required. There could be no trial by battle.[2] Its scope was wider. Damages could be obtained. It was on account of these advantages that Britton advised plaintiffs always to have recourse to it rather than to an appeal.[3]

A trespass, then, in Edward I.'s reign is a tort in so far as it is begun by the action of the injured individual—but it is of a criminal nature. A man can be punished for his trespasses by the court which tries the action. The court, indeed, exercises this power in the case of other actions;[4] but it is a power which obviously comes forward more prominently in the case of an action intended to redress serious wrongs. It is to the mixed character of this action—to its penal and its reparatory sides—that we must look for the growth of the misdemeanour on the one side, and, on the other, for a form of civil action which will supplement the deficiencies of our early law of tort. Looking at the criminal side, we see that many miscellaneous trespasses were presented at the tourn and the eyre.[5] When the general eyre declined and the itinerant justices confined themselves mainly to legal business,[6] when the justices of the peace took over the smaller criminal business,[7] it is felonies and "trespasses" which will be presented to them for trial; and it is the trespasses so presented which will become the misdemeanours of our later law. Looking at the civil side we see that the clause of the Statute of Westminster II.,[8] which gave a limited power to make new writs to meet cases, similar to those for which there was a remedy, but not exactly falling under any existing writ, was principally used to extend the scope of trespass. This will give to trespass its importance in the law of tort, and, ultimately, its dominance over the whole field of the common law. For cannot almost any cause of action whatever be regarded as a species of wrong to the plaintiff?

All this is still in the future. In the reign of Edward I. the scope of the law of tort as administered in the royal

[1] Y.B. 32, 33 Ed. I. (R.S.) 258—a case of beating, wounding, and imprisoning. The defendants were found guilty of imprisoning only; "therefore it was adjudged by *Bereford* that he should recover his damages, etc., and that the defendants should be taken;" Statute of Wales c. xi (cited P. and M. ii 525) shows that its object was punishment; and cp. Y.B. 18, 19 Ed. III. (R.S.) 14.

[2] Y.B. 32, 33 Ed. I. (R.S.) 318, 320. [3] i 123, 124.

[4] Y.B. 21, 22 Ed. I. (R.S.) 390, a clerk is ordered into custody for forging a letter of presentation; ibid 274, 276, a defendant who has been found guilty of disseisin with force and arms by the assize is sent to prison.

[5] Vol. i 79, 269. [6] Ibid 272-273. [7] Ibid 287-288.

[8] Ibid 398 n. 3, 13 Edward I. st. 1 c. 24; below 455-456; vol. iii 350-351, 429 seqq.

courts was narrow. No action was given for defamation, as Parliament solemnly declared in 1295.[1] The only fraud remedied by the writ of deceit was some deceitful act committed or coming to the notice of the court in the course of the conduct of a case.[2] The only species of forgery punishable (other than forgery of the king's seal or money, which was treason) was "the reliance on a false document in a court of law."[3] The only form of perjury which was punished was the perjury of an assize or a jurata.[4] Those who failed in an appeal were punished,[5] and a writ of conspiracy might be had against those who maliciously caused others to be indicted.[6] Thus in Edward's reign there were remedies against personal violence, there were remedies against forcible seizure of property, there were remedies against various frauds and other offences which might come under the notice of a court which was trying a case. It is not till these frauds and other offences have become generally actionable wherever committed that we shall see the main outlines of our modern law of tort.

Of other personal actions brought in the royal courts the most common were detinue, debt, covenant, and account. The writ of detinue lay for the wrongful detention of a chattel which belonged to the plaintiff. It was generally brought against a bailee. Possibly at this period it could not be brought against any other person.[7] A person who had parted with his goods involuntarily (i.e. otherwise than by a bailment) must sue either by the appeals of robbery or larceny, or, omitting the words of felony, by an action for a *res adirata*.[8] But early in Edward II.'s reign, if not before, the action of detinue was extended to such a case.[9] The writ of debt was originally almost one with the writ of detinue. To the end their wording was almost identical.[10] The plaintiff seeks the *restoration* of money. "It was in fact a general form in which any money claim was collected, except unliquidated claims for damages by force, for which there was

[1] R.P. i 133, "Non sit usitatum in regno isto placitare in Curia Regis placita de defamationibus." This field was left for the present to the ecclesiastical courts.

[2] P. and M. ii 533, 534.

[3] Ibid ii 539; cp. Y.B. 20, 21 Ed. I. (R.S.) 330—a forged tally; Y.B. 21, 22 Ed. I. (R.S.) 390, above 365 n. 4; vol. iii 400.

[4] P. and M. ii 539-541.

[5] Above 360.

[6] Articuli super Cartas (1300) c. 10; R.P. i 96; above 301; vol. iii 401-407.

[7] Vol. iii 324-326.

[8] Above 265, 361; vol. iii 319-322; "adirata" means gone from his hand against his will—adextratus, P. and M. ii 160 n. 2; cp. Bracton's Note Book case 284; Y.B. 21, 22 Ed. I. (R.S.) 468; Holmes, Common Law 168, 169; vol. iii App. Ib (2).

[9] Vol. iii 325-326.

[10] Register f. 139; vol. i App. IV; below 368; App. Vb 27, c 58, 59; vol. iii. App. Ib (1); cp. Y.B. 3, 4 Ed. II. (S.S.) 26; Maitland, Forms of Action 342.

established the equally general remedy of trespass."[1] It was also the appropriate form of action for chattels which the plaintiff could not allege had ever been in his possession.[2] The cases in which it was most usually brought were chiefly five—"To obtain money lent, the price of goods sold, arrears of rent due upon a lease for years, money due from a surety, and a fixed sum promised by a sealed document;"[3] to which may be added the recovery of a sum found due by arbitrators to whom a dispute had been submitted.[4] Also "statutory penalties, forfeitures under by-laws, amercements inflicted by inferior courts, money adjudged by any court to be due, can be recovered by it."[5] It was not till later that the five first-named causæ became generalized, and that it was said that a *quid pro quo* is the essential pre-requisite for success in an action of debt brought upon a contract. As the action could still be brought on causæ which were not contractual in their nature, it had, as we shall see,[6] some influence in later law upon the growth of the conception of quasi-contract.[7] The action of covenant was the only action in which executory contracts could be enforced and unliquidated damages obtained. It was used chiefly as a basis for the *finalis concordia*, and in the case of agreements to let land for a term of years. It was just about this period that it was settled that a writing under seal was needed for its validity.[8] The action of account dates from the early years of the thirteenth century;[9] and it was improved by statute in 1267 and 1285.[10] It was chiefly brought at this period against the bailiffs of manors, the guardian in socage, and partners.[11] We shall see that it is important in the development of the law of quasi-contract rather than of contract.[12]

If we look at the actions of detinue and debt we shall see that the line between property, contract, and delict is still very

[1] Holmes, Common Law 251.

[2] Y.B. 50 Ed. III. Trin. pl. 8; as to this case see below 368; vol. iii 355 n. 2.

[3] P. and M. ii 208; for instances of various actions of debt see Y.BB. 20, 21 Ed. I. (R.S.) 304—rent due; 21, 22 Ed. I (R.S.) 2—price of land sold; ibid 254, 256—money lent; ibid 595—a sum certain promised by writing under seal; 33-35 Ed. I. (R.S.) 86, 88—sureties.

[4] Eyre of Kent (S.S.) ii 23-27.

[5] P. and M. ii 208; see also Y.B. 12 Rich. II. 180-181; neither in this case nor in the case of an action for debt brought on on arbitration could there be any wager of law, ibid *per* Thirning, J.

[6] Vol. iii 425-426. [7] Ibid.

[8] Ibid 417-420; P. and M. ii 218; vol. iii App. Ib (3).

[9] P. and M. ii 219, citing Bracton's Note Book case 859 of the date 1232; vol. iii App. Ib (4).

[10] 52 Henry III. c. 23; 13 Edward I. c. 11.

[11] Y.BB. 20, 21 Ed. I. (R.S.) 180—by executors against a bailiff; 30, 31 Ed. I. (R.S.) 30—guardianship; 33-35 Ed. I. (R.S.) 294—partnership.

[12] Vol. iii 426-428.

confused. The writs of detinue and debt are both somewhat similar in form to the writ of right. They ask that something "be restored." They are both writs Præcipe. The pleadings of the parties in both actions allege a tortious detention, a tortious refusal to pay what is due.[1] To the last the law was never quite clear as to whether detinue sounded in tort or contract.[2] There is, perhaps, a slight perception of the distinction between tort and contract in the rule that the word "*debet*" must be used in the action of debt if the creditor is suing the debtor: the word "*detinet*" if the creditor's executor is suing. Money cannot be said to be due from anyone except the person who is bound personally.[3] There is, perhaps, a slight hint of the distinction between a wrong to property and the breach of a contract in the rule that detinue only lay where the plaintiff could allege that he had a right to the possession of the actual thing claimed, whereas debt lay if he claimed that the defendant was bound to give one of a class of things.[4] There is a tendency, in other words, to think that debt was the appropriate action in transactions of the nature of mutuum: detinue in transactions of the nature of commodatum.[5] But in spite of this the proprietary traits of the action of debt survived to the end. In Edward III.'s reign the distinction between using the words "debet" and "detinet" in the writ of debt was explained, not by reference to any theory of contractual obligation, but on the ground that the creditor could demand the money as his property, whereas the executor could not.[6] In 1670 Vaughan, C.J., said,[7] "Contracts of debt are reciprocal grants. A man may sell his black horse for present money at a day to come, and the buyer may, the day being come, seize the horse, for he hath property in him." As we have seen, the action continued to be the appropriate remedy in many cases which can be brought under the head neither of contract nor of delict nor of the breach of any proprietary right.[8]

[1] See e.g. the count in Y.B. 20, 21 Ed. I. (R.S.) 138; cp. Maitland, Forms of Action 332.

[2] Bryant v. Herbert (1877) 3 C.P.D. 389; Maitland, Forms of Action 370.

[3] Y.B. 21, 22 Ed. I. (R.S.) 256; and cp. Y.B. 33-35 Ed. I. (R.S.) 454.

[4] Y.B. 50 Ed. III. Trin. pl. 8; cp. Y.B. 3, 4 Ed. II. (S.S.) 26.

[5] P. and M. ii 204, 205; it is said, ibid n. 6, that about the middle of Henry III.'s reign the Chancery, in describing the loans of money made to the king by the Italian bankers, uses the words "mutuo tradere" instead of the word "commodare" which they had formerly employed.

[6] Y.B. 12, 13 Ed. III. (R.S.) 170, "In a case in which a man demands as heir he demands a profit due to himself, in which case he shall say *debet*, but in case of executors, inasmuch as they are to recover for the benefit of the testator's estate, the words of the writ shall be *injuste detinet* only;" so the Register ff. 138b, 140, "pur ceo que le *debet* suppose propertie, et executor ne poet clamer propertie de chose que fuit al morte."

[7] Edgecomb v. Dee (1670) Vaughan's Rep. at p. 101.

[8] Above 367.

The law of Edward I.'s reign draws no clear line between tort and contract. It knows only certain forms of action which can be brought under certain defined circumstances. But it is probable that the somewhat amorphous character of these actions made further developments the more easy. We may well doubt whether English law would have been able to develop a theory of contract upon quite original lines if its principles had been more fixed. Even when crime and tort and contract have become distinct branches of the law, there will remain in the forms of action abundant traces of the time when these branches were by no means distinct; and when the exigency of modern statutes requires a definition of a "criminal cause or matter,"[1] or a clear distinction between an action "founded in contract" and an action "founded in tort,"[2] it will not be easy to bring old rules under these modern rubrics.

II.—The Law Administered in the Local Courts

The Influences which Shaped the Development of the Law

That the growth in the fixity of the principles and practice of the common law, which has just been described, was reacting upon the law administered in the local jurisdictions both of the country at large and the boroughs, will be obvious, if we examine the effect of this influence upon the sources of the law therein administered.

(1) The country at large.

In the thirteenth century landowners were beginning to catalogue their possessions, and to enrol the proceedings of their courts. This gives us the two most important sources of law for this and the following centuries—the cartularies and the manorial extents,[3] and the court rolls.[4]

The cartularies contain documents and legal proceedings—the muniments of title of the possessions of the great landowners. Besides, they often contain many other miscellaneous documents.

[1] Above 199.

[2] Pollock, Torts (ed. 1904) App. A 557, 558.

[3] E.g. the Ramsey Cartulary (R.S.); the Rievaulx Cartulary (Surt. Soc.); the Domesday of St. Paul's (C.S.); the Custumals of Battle Abbey (C.S.); the Register of Worcester Priory (C.S.). See Maitland, Collected Papers ii 48-49; as Maitland points out, ibid 50, we must add to these a number of tracts on husbandry, associated with the name of Walter of Henley; as he says, "They bear directly rather on agricultural and economic than on legal history; but the historian of manorial law cannot afford to neglect them;" Walter of Henley and some other of these tracts have been edited for the Royal Hist. Soc. by Miss Lamond.

[4] For such rolls see Select Pleas in the Manorial Courts (S.S.); the Court Baron 107 seqq. (S.S.); the Durham Halmote Rolls (Surt. Soc.).

In the Cartulary of Ramsey Abbey we find a list of books, among which is noted, "A weak sermon on the text Jacob saw a ladder."[1] In the Cartulary of Eynsham Abbey we have an account of a search for lost deeds which had been entrusted to the prior.[2] Sometimes we have collections of proverbs,[3] or verses —the latter occasionally not over-complimentary to the other sex.[4] The Extents describe the actual condition of the manors which made up the estate of a large landowner. They tell us something of the state of their cultivation, of the buildings on them, of their acreage, of the nature of the common rights existing thereon, of the jurisdictional rights of the lord, of the terms upon which the tenants held—of all the facts, in short, which bore upon the value of the property.[5] Both the cartularies and extents give us practical illustrations of the working of the law. They stand to an exposition of the law in the same relation as a decided case or an abstract of title stands to such an exposition at the present day. They let us see the actual working of the agricultural system and the manorial organisation; and, as we have seen, some knowledge of the actual fields is needed if we are to understand aright the legal doctrines relating to them.[6] No doubt this is less necessary in the case of the rules of the royal courts relating to land held by free tenure. The abstraction and technicality which they attained at an early period made them as independent of the world of concrete fact as any philosopher's system. But, as we shall see, we can hardly understand the various and complex conditions of unfree tenure unless we look at the land itself. Fleta,[7] as we have seen, has given us some information upon these matters which he borrowed from Walter of Henley.[8] The idea that this information should find some place in a general book about law perhaps gives him some small claim to originality.

"The Extent," as Maitland has said,[9] "displays the manor at rest, the court roll the manor in motion." We have no rolls of the communal courts. Their proceedings were generally only recorded when it became necessary to bring them before the Curia Regis by writ of recordari facias.[10] It is true that the

[1] Ramsey Cart. i 64.
[2] Enysham Cart. i no. 275.
[3] Ramsey Cart. i 80.
[4] Ibid iii 316:—
"Sunt tria gaudia, pax, sapientia, copia rerum;
Hæc tria dirruit, hæc tria destruit ars mulierum."
[5] For a specimen see vol. iii App. II.
[6] Above 56-61.
[7] Above 322.
[8] As to this literature see above, 369 n. 3.
[9] Select Pleas in Manorial Courts (S.S.) xiv.
[10] Glanvil viii 8; for the writ see vol. i App. IXA; for the growth of the later distinction between courts of record and those not of record see Bk. iv. Pt. I. c. 4.

sheriff kept rolls of the common pleas heard by them; but, as each sheriff retained his own rolls, they were of little value to litigants, and have naturally disappeared.[1] It is otherwise with the feudal and franchise courts. In the thirteenth century the lords who kept these courts began to keep permanent records. The oldest court roll we possess comes from 1246; but there is indirect evidence that the abbot of Ramsey kept rolls in 1239; and the practice of making such rolls had become general by the middle of the thirteenth century.[2] These rolls show us that there is a large body of law systematically and regularly administered in these courts; and no doubt the practice of keeping them conduced to the growth both of system and regularity of administration.[3] They are at this period as important a source of English law for some of the as yet unformed branches of the common law as the rolls of the royal courts are for its older branches. And though the communal courts did not keep rolls, the prospect of a writ of false judgment conduced to a regard for regularity of proceeding, as upon such a writ the plea was elaborately recorded; and if fault could be found with the record the county was amerced.[4]

It is not surprising to find that just as books dealing with practice and procedure had come to be the books chiefly wanted by the practitioners in the royal courts, so, in the local courts, a demand sprang up for similar manuals. Many were printed in the sixteenth century.[5] Four of the earliest of them have been printed for the first time and edited by Maitland for the Selden Society. The first of these is a French tract called the Court Baron, the popularity of which is attested by the fact that it is found in seven MSS. The date of one of these MSS. enables us to ascribe one version of the tract to the thirteenth century. In its longest form it consists of three parts. In the first part the steward of the manor is supposed to be hearing civil cases; in the second part he is enforcing

[1] Y.B. 5 Ed. II. (S.S.) xviii; the Justices in Eyre were not interested in these rolls; they only wanted the rolls of crown pleas which would afford material for the collection of revenue, ibid; below 375 n. 5.

[2] Select Pleas in Manorial Courts (S.S.) xii-xv.

[3] Besides the actual legal proceedings they sometimes contain miscellaneous documents, e.g. Select Pleas, etc. (S.S.) 175 there is an indenture of manumission of a villein; The Court Baron (S.S.) 130 there is a memorandum that a book containing among other things a martyrology was borrowed by some one of the appropriate name of Fox.

[4] There are many such cases in Bracton's Note Book, see index i 187. In case 1436 there are six objections made to the record which detailed the various steps which had from time to time been taken in the case. In the end, "consideratum est quod comitatus in misericordia pro pluribus transgressionibus;" cp. Northumberland Assize Rolls (Surt. Soc.) 195.

[5] The Court Baron (S.S.) 3, 4; see Bk. iv Pt. I. c. 1 for the tracts which then got into print.

the lord's jurisdictional rights; in the third part he is dealing with cases which suppose that the lord has some franchise which enables him to hear pleas of the crown. Maitland thinks that the third part was added to the original work.[1] The second, "de placitis et curiis tenendis," is written in Latin; and its author is probably one John of Oxford, a monk in the priory of Luffield. It is contained in a volume which includes many legal works. But there is strong internal evidence for assigning the authorship of the section of the volume where this treatise occurs to this John of Oxford.[2] The third tract, "modus tenendi curias," is also in Latin. From internal evidence Maitland assigns as its date the year 1307.[3] The fourth tract is partly in French and partly in Latin. It professes to relate to courts held 14 and 16 Edward III. It cannot therefore be earlier in date than 1342.[4]

(2) The Boroughs.[5]

For the law administered in the boroughs we have a separate set of authorities. We have the charters which confer upon them their various jurisdictional, governmental, and fiscal privileges. We have sometimes books, red, white, and black, in which town clerks or other municipal officials collected the charters, records of decided cases, and all other documents bearing upon the privileges of the borough, or useful in the administration of justice within its boundaries. We have the custumals, or records of the customs observed in the borough. We have the records of the proceedings of the courts which administered justice within the borough.

We have seen that it was the charter which distinguished the borough community from the other communities existing in the country at large.[6] It was the charter which invested the borough with a distinct character. This distinct character —acquired for many and various reasons—was stereotyped by

[1] The Court Baron (S.S.) 6-11. The Cambridge MS. which contains this treatise, among other things contains, in the same hand, a note to the effect that, "In the 49th year of King Henry son of King John and the year of our Lord 1265 at Whitsuntide the following page was written in the chapel of St. Edward at Westminster and extracted from the chronicles in a small roll by the hand of Robert Carpenter of Haresdale, and he wrote this."

[2] Ibid 11-13; for more concerning John of Oxford see L.Q.R. vii 68.

[3] Ibid 13-15. In the precedents mention is made of 35 Ed. I. and 1 Ed. II. The statute of Quia Emptores is spoken of as one of the most recent of statutes.

[4] Ibid 15. Certain other tracts are described ibid 15-18. "It seems evident," says Maitland, "that before the thirteenth century was out there was a stock of 'common forms' current among lawyers, and that many different persons made it their own by such modifications as suited their offices and their tastes."

[5] For an exhaustive account of the authorities see Gross, Bibliography of Municipal History (Harvard Law Studies).

[6] Vol. i 31, 138-141.

the charter. The privileges which it conferred were different in different places.[1] It might give trading privileges—freedom from toll, a gild merchant, a right to hold a fair. It might give jurisdictional privileges—a right to hold a court with greater or less franchises. It might give governmental privileges—freedom from the burden of attending the hundred and county courts, the return of writs, which meant the right to exclude the royal officials, the firma burgi, i.e. the right to take the profits of the borough, paying for them a fixed sum to the crown or other lord of the borough, the right to elect their own officials and to provide for the government of the borough. It might give tenurial privileges—the power to make a will of lands, or freedom from the right of a lord to control his tenants' marriages. It might give procedural privileges—trial by battle is excluded, and trial by compurgation is secured and regulated. These mediæval borough charters are very varied, and represent all stages of development and all grades of franchise.[2]

We get more detailed information from the official books of the fourteenth and fifteenth centuries, composed usually by some town clerk or other official.[3] "The town clerk, in fact, was to the local government what two centuries earlier the trained lay lawyers had been to the central administration. From mere superiority of education, as a scholar and linguist, an accomplished lawyer, something of an historian and an antiquary, a skilled accountant, a scribe trained to finer penmanship and more exact views of spelling than the ordinary councillor, or even than the mayor himself, the clerk must have exercised an easy intellectual supremacy. Responsible only to the mayor, holding his post year after year in perfect security, he remained among the changing officers about him a permanent force . . . in whom was embodied a continuous

[1] See P. and M. i 627-652 for a summary, and an account of these privileges and franchises.

[2] For specimens granted by the crown see Stubbs, Sel. Ch. 107, 164-167, 307-314; Nottingham Records i 2, 6, 10, 22, 40, 52, 56, 76, 102, 196; for charters granted by mesne lords see Beverley Town Documents (S.S.) xix, xx; Leicester Records i 2, 3, 4; ii 149-152 for a lease of the bailiwick to the town; it was a general practice to get charters renewed at the beginning of a new reign, Green, Town Life i 211 seqq.

[3] Instances are the London Liber Custumarum, probably written by Andrew Horn in 1320, and the Liber Albus, written by John Carpenter the town clerk in 1419; also the Red Book of Bristol begun in 1344 by the Recorder William de Colford; the London Books are printed in the Munimenta Gildhallæ (R.S.); the Bristol Book is edited by Bickley; the Bristol Book thus describes itself, "Liber Rubeus ville Bristoll in quo continentur plurime libertates, franchesieque, constituciones dicte ville, ordinaciones diversarum arcium, composicionesque plurium canteriarum, ac aliarum multarum cartarum libertatum a tempore quo non extat memoria impetratarum."

tradition of administration and a fixed jurisprudence."[1] These books contain historical notices, charters, trade ordinances, notices of cases interesting to the town, information as to acquisition of or dealings with the civic property. They are analogous to the books in which, as we have seen, officials of the central government recorded information likely to be useful;[2] and like the official books of the central government they are sometimes relieved by "sketches and ornaments, with a snatch of French song, or a few quibbles or catches of very moderate wit, with a rugged ballad on the evils of overeating, or a final sigh of satisfaction from a German copyist, 'Explicit hic totum; pro Christo da mihi potum.'"[3] But what is most interesting from the point of view of legal history is the fact that they sometimes contain custumals, i.e. a collection of the rules of law observed in the town.

There are still surviving a large number of these borough custumals. Miss Bateson has collected and described many of them in her volumes on the borough customs.[4] The reasons for their compilation were various. The town might have purchased new privileges, or a royal enquiry might have necessitated a statement of the law, or another town with similar franchises might have desired such a statement.[5] They were usually compiled by the town clerk or other official of the borough, sometimes for the convenience of the official and those who should succeed him,[6] sometimes by the order of the governing body of the town.[7] They often purport to be a new edition of older customs. But statements as to their origin are often misleading. "Many examples might be cited to show that the scribes sought to father their digests of borough law upon the oldest act of borough legislation with which they were acquainted."[8] Their contents are various. They

[1] Green, Town Life ii 260.

[2] Above 224.

[3] Green, op. cit. ii 260, 261.

[4] Borough Customs (S.S.) i xviii-lvi.

[5] Ibid i xv, xvi.

[6] Liber Albus (R.S.) Pr. 3, "Quia . . . juniores . . . in civitatis regimine succedentes in variis casibus, pro defectu scripturæ nimirum, sæpius ambigebant; unde super judiciis reddendis controversia et perplexitas inter eos pluries causabantur: necessarium videbatur a diu, tam superioribus quam subditis dictæ civitatis quoddam volumen . . . ex notabilibus memorandis tam in libris, rotulis, quam in chartis dictæ civitatis inordinata diffusaque positis compilari."

[7] The Domesday of Ipswich recites that the old Domesday and the records were "borne away" by a "false common clerk," and that to remedy the uncertainty of the law so caused, "the comounalte of the forseyd toune . . . in the yere of the regne of Kyng Edwarde the sone of Kyng Herry, XIX. . . . of oon wille and oon assent ordayned that the lawes and usages of the same toune . . . shulden ben apertly put in Domysday and enseled with the comoun seel of the toun;" and for this purpose twenty-four men were appointed to draw up the laws, Black Book of the Admiralty (R.S.) ii 17, 19; cp. Beverley, Town Documents (S.S.) 1; below 392 n. 2.

[8] Borough Customs (S,S.) i xvi.

may include only doubtful and difficult cases which have recently arisen. They may include "all the chartered franchises, all the customs of the court sanctioned by immemorial usage, all the by-laws still in force."[1] They describe the law of the borough, just as the manorial extent describes the customs of the manor. They help us to understand the rolls of the borough court, just as the extent helps us to understand the rolls of the manor court.

Not many of the court rolls of the boroughs have yet been published. We have a varied selection of cases in Mr. Stevenson's records of Nottingham. At Leicester the records of the borough court have apparently been lost.[2] But we have surviving a roll of the Portmanmoot[3]—a court which dealt with debts and small trespasses; and we have the records of the gild merchant, which in this town and a few others exercised a considerable amount of jurisdiction over the members of the gild.[4] At Norwich we have the records of the court leet.[5]

Sometimes we find among the borough records specific references to courts specially set apart for trying cases by the law merchant. Probably the records of these courts, if they survive, would bear a close similarity to the records of the courts of fairs. The Selden Society has published part of the record of the fair of St. Ives. Bristol, as we have seen, contains in its Red Book a unique tract devoted to the consideration of the law merchant; and, as we might expect from the importance of the town as a seaport, a copy of the maritime laws of Oleron.[6]

The Development of the Rules of Law

(1) The country at large.

The law administered in these local courts, as contrasted with the law administered in the central courts, is concerned mainly with the activities and the conduct of the humbler classes of society. The larger landowners might in theory be amenable to the jurisdiction of some one or other of these courts; but it was difficult to secure their appearance,[7] even though they

[1] Borough Customs (S.S.) i xvi.
[2] Records of Leicester (Bateson) ix, x.
[3] Ibid i 116 seqq.
[4] Ibid i xxvii, 86 seqq.; Gross, Gild Merchant i 65, ii 143, 144; P. and M. i 651, 652.
[5] Leet Jurisdiction of Norwich (S.S.). Many of the municipal records have been lost by carelessness and acts of wanton destruction (Gross, Bibliography Introd.) just as the records of the kingdom have been similarly lost, App. I.
[6] Vol. i 527.
[7] Select Pleas in Manorial Courts (S.S.) 58—the Earl of Oxford is enrolled as a defaulter in the court of the Honour of Broughton.

could, if they pleased, appear by attorney.[1] Most of the larger litigation of the country, went to the central courts;[2] and even the smallest freeholder could have recourse to the king's courts in cases where his freehold was concerned. But the small freeholders were amenable to the jurisdiction of the local courts in the exercise of their petty police and criminal jurisdiction; and they naturally made use of them to pursue their petty personal actions. If, as often happened, their freeholds were intermixed with the villein tenements,[3] they would necessarily be bound by the ordinary agricultural arrangements of the community. Thus in spite of the doctrines of the royal courts, the law administered by these local courts often slurs over the distinction between free and villein, because from many points of view and in many cases it was really immaterial whether the parties before the court were free or villein. In cases, indeed, which deal with the lord's rights over the person of his villein the distinction is brought clearly before us. Thus a villein who gets leave to go to London will promise that he will at no time claim any liberty contrary to the lord's will, and that he will return when the lord requires him so to do.[4] Or, again, in cases where the villein is asserting that he is free, the distinction is the gist of the action; and in such cases the record will sometimes give details with respect to the pedigree of the person whose status is at issue.[5] Sometimes, in the orders issued by the court, a distinction will be drawn between free and villein;[6] but at other times all classes are included. Often, indeed, the distinction must have been hard to draw because the order might affect the villein tenants;[7] and free men held land by a villein tenure.[8] Thus it happens that except in these cases where the issue free or villein is more or less expressly raised, the court does justice upon free and villein alike. The vicar of St. Ives is amerced for lopping willows.[9] The chaplain at Brightwaltham is sued by Henry, the lord's butler, for defamation, and is convicted of breaking the lord's hedges and of carrying off his fowls.[10] At Castle Combe the clergy were notorious

[1] Above 316. [2] Vol. i 72-74. [3] Above 265.

[4] Select Pleas, etc. (S.S.) 26—a villein finds security, "quod propter moram suam Londoniæ decennam suam semper sequeretur et nullam libertatem contra voluntatem domini in nullo tempore vendicabit et quocienscunque dominus voluerit ad ipsum veniet."

[5] Durham Halmote Rolls (Surt. Soc.) i 99, 100; cp. 126 (Pittyngton), 129 (Moreslawe), 134 (Pittyngton), 137 (Wynæstowe), 138 (Hesilden).

[6] Ibid 61 (Fery), "De omnibus tenentibus villæ præter liberos tenentes. . . . Ordinatum est ex communi assensu tam liberii quam alii . . .;" cp. ibid 69, 72, 75, 101, 103. The cases in this note and the last are of the fourteenth century.

[7] Ibid 101, "Injunctum est omnibus tenentibus villæ quod nullus eorum vendat fimum alicui libere tenenti."

[8] Above 264-265; cp. The Court Baron (S.S.) 127.

[9] Select Pleas, etc. (S.S.) 89. [10] Ibid 173.

poachers, and were dealt with accordingly by the court.[1] At Billingham the chaplain is presented by the jury as being accessory to robbery.[2] At Aycliffe the daughter of the vicar is fined for incontinence (leyrwite).[3] At Brightwaltham the rector is in one passage at least classed with the villeins.[4] On one of the Durham manors to call another "rusticus" is made an offence—though in many cases the impeachment would undoubtedly have been true.[5] We have seen that distinctions as to status do not hold in the criminal and police law.[6] The inhabitants of the hundred and the vill are liable, irrespective of their status, to the varied amercements which may be imposed upon them for the neglect of their duties.

For these reasons we find among these local communities a communal feeling[7] which leads to rules and transactions which, to modern ideas, appear strange. The vill is made liable for the acts of its reeve assented to by itself—almost as a principal for the acts of his agent.[8] The vill appoints an attorney,[9] makes an exchange with the lord,[10] purchases a right of way,[11] commits a trespass,[12] appears as plaintiff,[13] takes a lease for seven years.[14] In the Register of Writs there is a writ ordering an account to be rendered to a vill.[15] Nor are these transactions confined to the vills or manors. The men of Cornwall agreed with John that their county should be disafforested, and that they should elect their sheriff. The county of Chester petitioned the king in the Parliament of 1278.[16] As we might expect, we find this communal feeling very much increased among the privileged

[1] History of Castle Combe 155 n., 164, 165.

[2] Durham Halmote Rolls (Surt. Soc.) 56.

[3] Ibid 13; cp. 27.

[4] Select Pleas, etc. (S.S.) 164.

[5] Durham Halmote Rolls (Surt. Soc.) 40, "Injunctum est omnibus tenentibus villæ nequis eorum vocat alium *rusticum* sub pœna di. marcæ."

[6] Above 202, 272.

[7] Above 73; English Society, 214, 215; for a good general account of the doings of these communities see Vinogradoff, Manor 185-199.

[8] The Court Baron (S.S.) 120, "Albinus prepositus injuste cepit equum Reginaldi Brid et illud detinuit contra vadium et pledgium, et hoc fecit per assensum communitatis villæ . . . ideo consideratum est quod recuperet . . . sex denarios de tota communitate predicta."

[9] Select Pleas, etc. (S.S.) 150; cp. E.H.R. xxxvii 408-409, 413.

[10] Ibid 172, "Ad istam curiam venit tota communitas villanorum de Bristwalton' et . . . sursum reddidit domino totum jus quod idem villani habere clamabant racione commune in bosco domini qui vocatur Hemele. . . . Et pro hac sursum reddicione remisit eis dominus . . . communam quam habuit in campo qui vocatur Estfield."

[11] The Court Baron (S.S.) 142.

[12] Durham Halmote Rolls (Surt. Soc.) 71, "De communitate villæ pro transgressione;" cp. ibid 20, "De communitate villæ præter Thomam Toller et Willelmum Toller pro dampnis factis."

[13] Select Pleas, etc. (S.S.) 150; cp. E.H.R. xxxvii 408-409, 413.

[14] Ramsey Cart. ii no. 360 (1280). For earlier instances from D.B. see Vinogradoff, English Society 257, 258.

[15] Register f. 136.

[16] Stubbs, C.H. ii 235, 236.

tenants on the ancient demesne of the crown, i.e. on land which belonged to the crown on the day when Edward the Confessor was alive and dead. We shall see that these tenants were both individually protected against their lord by the little writ of right, and also collectively protected by the writ of monstraverunt.[1] Nor, in this litigious age, were they slow to assert these rights.[2] But, though emphasized on these manors, it is not peculiar to them. It shows itself all over the country, not only in the transactions of the community itself, but also in its jealousy of strangers. At King's Ripton (a manor in ancient demesne) very careful conditions as to the devolution of the property were made when leave was given to marry a foreigner.[3] On the manors of Little Stukely belonging to the abbot of Ramsey pledges must be found for the good conduct of a stranger received into the manor.[4] Though there are frequent mentions of strangers in the documents,[5] the community was careful to see that they did not acquire rights of common to the prejudice of the regular inhabitants.[6]

This communal feeling rendered the customary law which these local courts administered a very real thing. This law is administered in a manner and under forms which endeavour to copy the manner and forms of the royal courts; and this makes for regularity and fixity, and sometimes for technicality and strictness of procedural rules.[7] It is the custom declared by the court which forms the main part of the law administered.[8] It is the by-laws made for the regulation either of the general conduct or the agricultural economy of the community to which the court appeals, because those by-laws have often been made by a court which, to use the expression of some of the Durham Halmote rolls, has been summoned "ad tractandum de communibus negociis proficuum villæ tangentibus."[9] No doubt the lord often reserved to him-

[1] Vol. iii 263-269.

[2] Select Pleas, etc. (S.S.) 99-106; Vinogradoff, Villeinage chap. iii.

[3] Select Pleas, etc. (S.S.) 121. [4] Ibid 96, 97.

[5] As Vinogradoff says, "The fugitive villein and the settler who comes from afar are a well-marked feature of feudal society," Villeinage 158, 159.

[6] Durham Halmote Rolls 17, "Præpositus et juratores conqueruntur et presentant quod quidam subscripti non tenent terram ratione cujus deberent communiare in pastura et tamen depascunt pasturam villæ per averia sua ad deterioracionem illorum qui terram tenent;" The Court Baron (S.S.) 146, 147.

[7] Select Pleas, etc. (S.S.) 56, 57, 119, 128; below 399.

[8] The Court Baron (S.S.) 143, 145, 146, 147; Select Pleas, etc. (S.S.) 29, 38, 41, 44, 45, 116, 117.

[9] Durham Halmote Rolls (Surt. Soc.) 70—cp. 72, 94, 142. For instances of such by-laws see ibid 24, 33, 54, 55, 61, 94; The Court Baron (S.S.) 125, 126, 142, 143, 146; cp. ibid 23, "encountre le ordeinement e la general constitucion du reaume e encountre *les estatuz le seigneur* e sa franchise;" History of Castle Combe 164, 238; for a good account of some late instances of the performance of these functions of manorial courts at the end of the seventeenth and in the eighteenth centuries, see Webb, Local Government ii 75-87; these by-laws sometimes came

self the consideration of nice points of law. We have such a case on the Durham rolls turning on a question of contributory negligence.[1] Or he reserved for his own decision cases which were specially important to himself—for instance a question whether a given piece of land was held by free or by unfree tenure.[2] No doubt both the lord's steward and the courts of common law would overrule customs which they considered to be unreasonable.[3] But when all deductions are made it is to the opinion of the court, either as recorded on its rolls[4] or expressed in the verdicts of the suitors, that we must look for the greater part of the law which it administers.[5] In a manner the lord holds to his court the position which the king holds to the courts of common law. Thus, the lord can give privileges in matters of procedure for which it is worth the tenant's while to pay,[6] and his mere patronage is worth securing.[7] Similarly the customary law administered in these local courts bears somewhat the same relation to the lord as the common law bears to the king. Just as the common law was regarded rather as the custom of the kingdom than as the expression of the king's will, so these customary rules were regarded rather as the custom of the district than as the expression of the lord's will.

Under these influences a body of law regulating the rights and duties of those who held by unfree tenure grew up. The process was helped by the growth of the practice of making manorial extents.[8] They detail with great minuteness the various services expected of the various classes of tenants in return for their holdings. They describe the times and seasons at which the ploughings, the reapings, the harrowings, the carrying duties, and all the other various services needed to

before the common law courts who enforced them or not according as they considered them to be reasonable, below 398, 400; and see Crumwell's Case (1573) Dyer 322a; Anon. Gouldsborough 79 pl. 13; James v. Tutney (1636) Cro. Car. 497; for the effects of this control by the common law courts, see below 401-405.

[1] Durham Halmote Rolls 3—one Pape owed carrying duty to the lord. His horses were ill and one William performed the duty with a horse of the lord. At Durham William's horse was seized by the king. William sued Pape, saying that it was his fault that he lost the horse. Pape pleaded that William might have kept the horse, and that the damage did not arise from his default.

[2] Select Pleas, etc. (S.S.) 22.

[3] Below 398, 399-400.

[4] The Court Baron (S.S.) 133, 147, the terrier is vouched; 134, the rolls are vouched; Select Pleas, etc. (S.S.) 110, 111; Durham Halmote Rolls 14, land held "per rotulos Halmoti."

[5] See generally Vinogradoff, Villeinage 172-176; P. and M. i 342, 343. Cp. especially Select Pleas, etc. (S.S.) 116, 117 and note.

[6] The Court Baron (S.S.) 27, 32, 38; Select Pleas, etc. (S.S.) 40.

[7] Select Pleas, etc. (S.S.) 11, "Johannes le Mercer dabit iii gallinas annuatim ad festum S. Martini pro habenda advocacione domini;" it is sometimes expressly forbidden to villeins to make this arrangement with another lord, Cart. Glouc. (R.S.) iii 217, cited Vinogradoff, Villeinage 158 n. 3.

[8] Above 370.

cultivate the lord's demesne, can be demanded. They detail the various customary payments—the heriots, the reliefs and the merchets which can be demanded of the tenant. Sometimes, too, they show us that the lord also owes duties. He may be obliged to give his tenants meals for some kinds of work which he demands of them.[1] They show us, too, that even at the end of the thirteenth century the process of commutation has begun. Estates may be let, either ad censum or ad operationem;[2] and the names given to many of the payments exacted in later times —fish silver, malt silver, barley silver—point to commutation.[3] Whatever may have been the rights of the lord in earlier days to the services of, or to the land occupied by the tenant, they are becoming limited to the rights declared on the extents and the rolls. Hereditary rights are recognized upon many manors;[4] and we see on the court rolls that interests in land are settled in a manner which presupposes their existence.[5] When land is granted to a stranger it is sometimes stated that this is done because no one of the kindred of the deceased will take it.[6] The tenants convey their interests by surrender and admittance in court—the adoption of any other mode of conveyance is a cause of forfeiture.[7] Their rights also are limited by the theory that the lord is still the owner. They cannot alienate quite as they please. They cannot waste the land. They must cultivate it in accordance with the rules and regulations of the manor.[8] Still they have rights, though, compared with the freeholder's, they are limited rights. Some of the incidents of their holdings are not yet fixed. We meet occasionally with proceedings which suggest a doubt as to whether their interests may not be devisable.[9] But in many respects the proceedings and the rules relating to their holdings are coming to be fashioned upon the model of the proceedings and the rules relating to freeholding. In one case we see a final concord made by a married woman

[1] Vinogradoff, Villeinage 174.

[2] E.g. see Domesday of St. Paul's (C.S.) 61, 62; Register of Worcester Priory (C.S.) 10b, "De consuetudinibus villanorum cum fuerint ad operationem."

[3] Vinogradoff, op. cit. 291; vol. iii 202-206.

[4] Select Pleas, etc. (S.S.) 166; Domesday of St. Paul's (C.S.) 52, there is an entry as to the land of certain akermanni which "dominus potest capere in manu sua cum vult sine injuriis hereditarie successionis"—which implies hereditary succession in other cases; Vinogradoff, Villeinage 172.

[5] The Court Baron (S.S.) 136, "Et veniunt Johannes Bulwarde et Mabilia uxor ejus et dictum tenementum ceperunt habendum et tenendum sibi et sequele sue secundum consuetudinem manerii, et si iidem Johannes Bulward et Mabillia uxor ejus obierint sine herede de corporibus eorum exeunte quod dictum tenementum revertatur heredibus dicti Johannis le Hird;" see ibid 142; Select Pleas, etc. (S.S.) 166.

[6] Durham Halmote Rolls (Surt. Soc.) 21.

[7] Select Pleas, etc. (S.S.) 112, 121.

[8] Vinogradoff, Villeinage 166.

[9] Select Pleas, etc. (S,S.) 125, 127.

after a separate examination as to her consent.[1] In another case we see something very like a writ of entry ;[2] and in another a suit in the nature of a mort d'ancestor.[3] Perhaps the strongest instance of the extent to which these courts carried their imitation of the common law is seen in the fact that on several manors a custom grew up, some time after the passing of the statute De Donis, to entail lands; and, at a still later period, a customary method of barring the entail.[4]

In the growth of these fixed rules we can see the beginnings of the copyhold tenure of our later law. With a changed economic system, under which the land is cultivated by the hired labourer and not by the villein tenant, tenure of land by unfree tenure will become simply a form of property owning, the incidents of which are determined by the customs of the manor. When at the end of this period it gains the protection of the king's court, and the old procedural test between free and unfree tenure therefore ceases to be applicable, we shall be obliged to look to the mode in which the copyholder transfers his property for that "conveyancing test" which in modern law distinguishes the two forms of tenure.[5] We shall see, too, that these same legal and economic causes, which transformed villein tenure, coupled with a strong leaning on the part of the royal courts in favour of personal liberty, led also to the decay of villein status.[6]

We must now turn to the other side of the jurisdiction of these courts. They were kept busy with various petty offences presented by the jury, and with the contractual and delictual actions of the inhabitants of the manor.

Persons were presented who blocked up the highway, who committed petty larcenies, who kept animals which did damage, who broke the numerous by-laws made by the community.[7] The manorial officials were presented for misdeeds in the conduct of their offices, and the tenants for not performing, or not duly performing, their services. Villeins were presented who got themselves prosecuted in the ecclesiastical courts, and thus lost their lords' chattels entrusted to them; and this doctrine that the chattels of the villein are the chattels of the lord "enables the lord to exercise a paternal control in the interests of morality."[8]

[1] The Court Baron (S.S.) 138. [2] Ibid 119.
[3] Y.B. 17 Ed. III. (R.S.) 590.
[4] Litt. § 73; Challis, Real Property (ed. 1892) 272, 273; the process began early, to judge from the entry on the Littleport Rolls cited above 380 n. 5, the date of which is 1323.
[5] Vol. iii 33. [6] Ibid 491-501.
[7] For specimens see The Court Baron (S.S.) 122, 123, 128, 131, 137, 140, 141; Select Pleas, etc. (S.S.) 90, 91, 167, 169; Durham Halmote Rolls (Surt. Soc.) passim, and see pp. 138, 140, 149, 171 for by-laws against playing at ball.
[8] Select Pleas, etc. (S.S.) 97, 98.

In other cases this control was more directly exercised.[1] Those guilty of incontinence must pay a "leyrwite."[2] A lord who had the assize of bread and beer was able to control those who supplied these commodities. The presentments of those who broke the assize by selling short measure, or stuff of bad quality, or at an excessive price are frequent.[3]

The tenants of the manor were not slow to sue one another whenever they had, or thought they had, a cause of complaint. Actions of debt, detinue, and covenant are frequent. It is probable that these courts allowed in many cases an action for breach of executory contracts not under seal which were not yet enforceable in the royal courts.[4] Possibly, too, a pledge of faith was regarded as giving some legal effect to a bargain.[5] Nor was the distinction between debt and detinue carefully observed. A man will complain of the "detention" of money, the price of goods sold.[6] In contracts of sale of land the court sometimes considered the question whether there had been a breach of warranty of title.[7] In contracts of sale of goods the court might have to deal with allegations of fraud and disputes as to quantity.[8] The torts of which the villagers accused one another were many and various. Defamation is one of the most common.[9] This was an offence for which, as we have seen,[10] the king's courts had in Edward I.'s reign declined to give any redress. But it had been recognized as an offence by the Anglo-Saxon laws;[11] and these local courts, in giving redress, may have unconsciously followed an old tradition. At any rate they gave the offence a generous scope. Sometimes it amounts to a contempt of court;[12] sometimes to an allegation of a kind of malicious prosecution.[13]

[1] History of Castle Combe 246—an order of 1455 regulates the hours at which public-houses may be open; ibid 328 (1567)—an order that butchers shall not suffer any playing at unlawful games "for mete" in their shops; ibid 335 (1611)—an order against the unlawful game "shifte-groate."

[2] Durham Halmote Rolls (Surt. Soc.) 13, 27, 152 and many other cases.

[3] Ibid 29, 53, and other cases; Select Pleas, etc. (S.S.) 11, 18, 113.

[4] The Court Baron (S.S.) 116.

[5] Select Pleas (S.S.) 28; Durham Halmote Rolls (Surt. Soc.) 92; at p. 154 there is an admission that *læsio fidei* might afford a ground of action in the ecclesiastical court.

[6] The Court Baron (S.S.) 132, "Willelmus Michel queritur de Johanne Tepito quod ei injuste detinet xiis. vid. pro una vacca et uno vitulo sibi venditis."

[7] Select Pleas, etc. (S.S.) 19. "Isabella Sywardi in misericordia quia vendidit Ricardo Bodenham terram quam ei warantizare non potuit."

[8] Ibid 139, 140.

[9] The Court Barron (S.S.) 116; Select Pleas, etc. (S.S.) 19, 36, 109, 173; History of Castle Combe 325, 328.

[10] Above 366.

[11] P. and M. ii 536 citing Laws of Hloth. and Ead. c. 11; cp. L.Q.R. xviii 260.

[12] The Court Baron (S.S.) 126-127.

[13] Ibid 125, "Compertum est per inquisicionem quod Alicia uxor Wilelmi le Huxtere defamavit Mabiliam uxorem Ricardi Mauntele unde eadem Mabilia deteriorata fuit in capitulo."

In some cases the damages caused by the defamation are specially stated and seem to be the gist of the action. Thus we find that Alice Balle has defamed the lord's corn, whereby other purchasers forebore to purchase.[1] In another case the plaintiff in an action for slander and libel alleges his special damage with great particularity—it consists in the fact that his landlord has cut off three years from the term for which he holds certain land on lease.[2] In one very curious case there was apparently a scolding match. "It is found by inquest that Rohese Bindebere called Ralph Bolay thief, and he called her whore. Therefore both in mercy (3d.). And for that the trespass done to the said Ralph exceeds the trespass done to the said Rohese, as has been found, therefore it is considered that the said Ralph do recover from the said Rohese 12d. for his taxed damages"—a curious application of the principle of set-off.[3] To judge from the Durham rolls, the women were frequent offenders with their tongues;[4] and at Castle Combe in 1520 a woman is presented as a communis garulatrix ad commune nocumentum.[5] There are frequent cases of ordinary thefts, trespasses, and assaults;[6] and some of these cases have a modern look. In the court of the Bishop of Ely an action is brought against two defendants for words spoken whereby others declined to make contracts with the plaintiff;[7] and one of the precedents in the Court Baron is a precedent of a suit for procuring a breach of contract.[8]

We must not expect these courts to be very careful of the distinctions between the various causes of action. Such distinctions were only gradually emerging in the royal courts.[9] Contract and tort often seem to be confused. In one case a man is "convicted" by a jury of the breach of an agreement.[10] In another the non-payment of a debt is charged as a breach of the peace.[11] Had these courts been more careful of such distinctions they could not have done the rough yet substantial justice which they were able to do. The law they administered was elastic,

[1] The Court Baron (S.S.) 130.

[2] Select Pleas, etc. 116.

[3] The Court Baron (S.S.) 133.

[4] Durham Halmote Rolls (Surt. Soc.) 132, "Injunctum est omnibus mulieribus villæ quod compescant linguas suas et quod non litigent nec maledicant aliquem;" ibid 144, 147, 152, 153 for similar orders.

[5] History of Castle Combe 326.

[6] One case from the Littleport Rolls (The Court Baron (S.S.) 138) contains a queer view of the nature of consent—"It is found by inquest that William Fowler committed a trespass on Walter Albin and carried off his goods and chattels from his house on divers occasions against his will, but with the consent of his wife, *which consent he obtained by frequently kicking her*, to the damage of the said Walter 13s. 4d."

[7] The Court Baron (S.S.) 130, 136.

[8] Ibid 40.

[9] Above 367-369.

[10] Select Pleas, etc. (S.S.) 36.

[11] Ibid 147, 148—the words used are "injuste detinet et deforciat contra pacem domini et ballivorum suorum;" cp. Glanvil's writ of debt, vol. i App. IV.

and it was equitable. We often find that a person is let off paying an amercement on the ground of poverty.[1] They continued to exercise these powers; and in later days, when equity was becoming, in the hands of the chancellor, a technical system, Coke recognized that some of the powers exercised by the lord were in substance equitable.[2] If equity acts *in personam*, and if equitable interference is grounded upon a consideration of the circumstances of the individual case, these courts, all the members of which were intimately known to one another, were well fitted to exercise it. Technical difficulties do not stop them from applying that which seems to be the obvious remedy in any given case. They will order the specific performance of a contract.[3] They will issue something very like an injunction,[4] sometimes even a mandatory injunction.[5] Persons who are notoriously bad characters they will "send to Coventry,"[6] or banish from the vill.[7] They will attach a man's salary if that seems to be the best way to enforce appearance,[8] or to secure the payment of damages adjudged by the court.[9] In the surrenders of the tenants to the use (*ad opus*) of the purchaser, in the orders of some of these courts to a defendant to perform acts *sub pœna*, we see words, and perhaps ideas, which in later law and in another jurisdiction will become very famous.[10] Some of these words and some of these ideas have doubtless been borrowed from the contemporary practice and procedure of the courts of common law. Others rest upon that basis of customary law which is common to the law administered in the royal courts and in the local courts. We have seen that many of these words and ideas gradually disappeared from the law administered in the courts of common law.[11] They will reappear in those newer courts which the growing rigidity of the common law will necessitate.

[1] Select Pleas, etc. (S.S.) 114; ibid 166, a merchet is reduced for this reason; Durham Halmote Rolls 73.

[2] Complete Copyholder § 44, "In deciding controversies arising about the title of copyhold land . . . and when he sitteth as judge in court to end debates of this nature, he is not tied to the strict form of the common law, for he is a Chancellor in his court, and may redress matters in conscience upon a Bill exhibited, when the common law will afford no remedy in the same kind."

[3] The Court Baron (S.S.) 115; Durham Halmote Rolls (Surt. Soc.) 29.

[4] Durham Halmote Rolls 39, "Injunctum est Thomæ Herynger ne faciat oleum post festum Natalis Domini infra domum ubi nunc moratur . . . sub pœna di. marcæ, quia omnes tenentes villæ graviter conqueruntur quod talis gravis odor procedit de infusione olei quod nullus possit adire ibidem absque periculo."

[5] Ibid 42, "De Ricardo filio Thomæ quia non revocavit filium suum de scola ante festum S. Mich. prout injunctum fuit in ultimis Halmotis, de pœna 40*d*."

[6] Ibid 49, 50, John Lollis is accused of various misdeeds, and so, "injunctum est omnibus tenentibus villæ ne quis eorum inhospitaverit predictum Johannem Lollis nec cum eo in comitiva sua recipiat sub pœna di. marcæ;" ibid 55, where the order is repeated; History of Castle Combe 244.

[7] The Court Baron (S.S.) 122, 123, 124.

[8] Durham Halmote Rolls 38.

[9] Ibid 73.

[10] Select Pleas, etc. (S.S.) 106.

[11] Above 344-347.

For the present these local courts are creating the copyhold tenure of our later law; and they are doing the work of the modern county court and the modern police court. At the end of the mediæval period some of the branches of law which they administer will have passed to the justices of the peace.[1] In the following period other branches will be absorbed by the courts of common law, the court of Chancery, and the court of Requests; while for others no provision will be made till quite modern times. Even when all these branches of law have ceased to be administered by these local courts, there will, as we have seen, remain abundant traces of the old machinery by which they were once administered with rough effectiveness.

(2) The Boroughs.

In the thirteenth century the borough, though a chartered community, is but one among the many varieties of the communities of the land. The question what features will entitle any given community to call itself a borough is a question not easy to answer, because there are so many and so great divergencies between places which call themselves by that name. Some, hardly distinguishable from the country township, wish to claim for themselves the position of a borough,[2] and they may be able to show a royal charter and make good their claim.[3] Others clearly hold a position different to that of the ordinary communities. London had large franchises which freed it from the control of the sheriff of the county; and other towns attained this position in the fourteenth and fifteenth centuries.[4] Some, though not free from the control of the sheriff or even of a mesne lord, lay[5] or ecclesiastical,[6] possessed varied franchises and privileges which placed them in a distinct category. The external test in the past has been the separate appearance of the

[1] Vol. i 287-288.

[2] See the case of the vill of Fairford, Maitland, Gloucester Pleas pl. 157, "Villata de Fairford juravit per se et noluerunt sequi cum hundredo suo, et ideo [ad judicium] quia comitatus recordatur quod semper responderunt cum hundredo."

[3] Northumberland Assize Rolls (Surt. Soc.) 79—a place called Warnemue successfully asserted the same liberties as those possessed by Newcastle-upon-Tyne; Manchester, on the other hand, was decided not to be a borough, Tait, Manchester 52-54; see Webb, Local Government ii 265-267 for a clear account of the difficulty in distinguishing the borough communities from other communities.

[4] E.g. Norwich in 1403, Leet Jurisdiction in Norwich (S.S.) lxxi; Nottingham in 1448, Nottingham Records ii 156-209.

[5] E.g. Leicester.

[6] E.g. Beverley. The privileged places outside the borough jurisdiction existing down to quite modern times sometimes recall the privileged position of the crown or of some of these mesne lords, see Bracton's Note Book case 1640; Borough Customs (S.S.) i 3, 103; Leicester Records i xxiv 123; Nottingham Records ii 91; Munimenta Gildhallæ (R.S.) ii pt. i 149-151; Municipal Corporations Report (1835) 31, 43; Maitland, Township and Borough 37, 38.

borough community before the justices in Eyre;[1] in the future it will be its separate representation in Parliament.[2] We can want no better proof of the fundamental similarity of the borough community to the other communities of the land than the merger of the representatives of the counties and the boroughs in one House of Commons, and the fact that both Littleton[3] and Coke,[4] when they wished to define a borough, chose its separate representation in Parliament as its most distinctive feature.

But, though it is thus difficult to draw a line between the borough and other communities, already in the thirteenth century the borough was beginning to acquire a distinctive set of characteristics. I shall glance rapidly at some of the activities of the borough in order to ascertain the causes which are thus differentiating the borough community from other communities of the land. We shall then be in a position to compare the boroughs with these other communities, and thus to learn something of the shape which all the various communities were taking under the pressure of the doctrines of the common law.

The borough has a court with (i) civil, and (ii) criminal and police jurisdiction.

(i) If we look at the law administered in civil cases by these borough courts we shall see a general similarity between the law there administered and that administered in the other local courts. But there are also certain differences. These differences arise either from the fact that the borough is a chartered franchise; or from the fact that the court is held in a district which is inhabited by a denser population, and in a district composed of merchants, manufacturers, and traders, as well as of those engaged in agriculture.

The charter and the custumal[5] tend to stereotype certain kinds of custom. Thus compurgation under very various forms holds its ground in the boroughs long after it has become practically obsolete in the royal courts.[6] In many boroughs no trial by battle is allowed.[7] As in the manorial courts, so in the

[1] Above 385 n. 2; vol. i 266.

[2] The number of boroughs thus separately represented fluctuates, either because the boroughs objected to pay the wages of their representatives and taxes on a higher scale (Stubbs, C.H. ii 566; Liber Albus i 147, 167, 168 there cited); or on account of the hostility of a mesne lord (P. and M. i 654, 655; Gross, Gild Merchant ii 33-35); some boroughs, e.g. St. Albans, were more farsighted, and complained if deprived of their right of separate representation (R.P. i 327, 8 Ed. II. no. 195).

[3] § 164.

[4] Co. Litt. 109, "A Burgh is an ancient town holden of the king or any other lord which sendeth Burgesses to the Parliament."

[5] Above 374-375.

[6] Borough Customs (S.S.) i 36-51, 170-185; Domesday of Ipswich, Black Book of the Admiralty (R.S.) ii 171; Liber Albus (R.S.) i 294, 295.

[7] Borough Customs (S.S.) i 32; it might sometimes be allowed between burgess and foreigner, ibid 34, 35.

borough courts, special rules grow up upon such matters as summons, attachment, and distraint.[1] The essoin of fairs is peculiar to the borough court.[2] In some boroughs the villein who resides for a year and a day becomes free—a privilege which makes for the exclusion of seigneurial interference.[3] Some boroughs appear to know something very like the decisory oath of Roman law.[4] We shall see that a set of very distinct customs as to land tenure arises in many boroughs.[5]

The borough was a mercantile community. For this reason we find special rules relating to apprentices.[6] There is more need for the hired servant; and some custumals contain special rules upon such a modern branch of the law as enticing away servants bound by contract to serve another.[7] In one case a persuasion not to contract is pleaded as an aggravation of damages.[8] The wife who is a trader is regarded in many places as a feme sole.[9] In the Bristol treatise on the Law Merchant there are special rules as to the liability of masters for the acts of their apprentices and agents.[10] In London there are special rules as to brokers.[11] In actions for debt a tally was in some boroughs as good as a deed[12]—it would preclude the possibility of a disproof of liability by wager of law. Earnest money will bind a bargain.[13] The custom of Foreign Attachment is very generally found in the boroughs, and still survives.[14] Perhaps the greatest curiosity of all is to be found in a fifteenth century custumal of Lincoln. According to this code the entry in a merchant's book created an obligation.[15] One wonders whether or no there has been a conscious imitation of the Roman literal contract.

We have seen that in the country many varied kinds of contracts and torts were actionable in the local courts which

[1] Below 397 n. 5; Borough Customs (S.S.) i 89 seqq.; ii xxii, xliv.

[2] Ibid 161 (Leicester).

[3] Nottingham Records i 2 (Henry II.'s charter). This was not the case at London or Norwich, Liber Albus i 33, 452; Leet Jurisdiction of Norwich (S.S.) lxxxv-viii; Gross, Gild Merchant i 30; P. and M. i 634.

[4] Borough Customs (S.S.) i 184, 185 (London); Bracton (f. 290b) mentions it, but it gets no foothold in English law, P. and M. ii 634.

[5] Vol. iii 269-275.

[6] Borough Customs (S.S.) i 228, 229.

[7] Ibid 216.

[8] Nottingham Records i 115, below 388; Borough Customs (S.S.) ii lxxxiv.

[9] Ibid i 227, 228; ii cxii.

[10] Red Book of Bristol i 66, "Ordinatum est quod domini hujusmodi apprenticiorum et subditorum respondeant eodem modo de hujusmodi bonis et mercandisis eis per manus hujusmodi apprenticiorum et subditorum suorum quocunque modo traditis;" cp. ibid 78; vol. iii 387.

[11] Liber Albus (R.S.) i 269, 400, 401.

[12] Borough Customs (S.S.) i 202-205.

[13] Ibid 217-219.

[14] Ibid 127-129.

[15] Ibid 204.

would probably not have been actionable in the royal courts.[1] As we might expect, we see the same phenomenon on a larger scale in the boroughs; and this is due, no doubt, partly to the retention of old forms and old rules, partly to the influence of that general mercantile custom which, all over Europe, was developing the idea of a consensual contract.[2] Of this phenomenon the records of the borough of Nottingham contain many interesting illustrations. In 1311 there is an action for breach of covenant which turns upon an agreement made between five persons that they should make certain contributions to a light before a shrine of St. Mary, and that the defendants should trade with these contributions, and account for the profits, which were to go towards the maintenance of the light.[3] In 1327-1328 there is an action for the non-return of a horse and armour lent to use in the Scotch war.[4] A surgeon sues for money due for curing an arm.[5] One chaplain sues for school fees,[6] another for money due for getting an indulgence.[7] A tailor (1384-1385) sues for the detention of goods which he and the defendant "won together in time of war in the land of Flanders, in the expedition of the venerable father Henry, Bishop of Norwich, in the sixth year of the reign of King Richard II."[8] Quite the most "sporting" of these actions is an action of debt upon a bet made upon the result of a horse race; one of the parties did not appear to race, and the other party claimed the stake (20s.) and damages (40d.) for its unjust detention.[9] Among the actions for tort we may note an action for malicious prosecution, whereby the plaintiff's goods were distrained so that he lost the profits which he might otherwise have made at a fair.[10] Slander is sued for by an action of trespass.[11] A refusal by a common water-carrier to supply water at the usual rates is sued for as a tort; and the plaintiff puts forward the fact that the defendant has persuaded other water-carriers not to contract with him as an aggravation of his damages.[12] Later developments of the common law are antici-

[1] Above 382-383.
[2] Borough Customs (S.S.) ii lxxix-lxxxii.
[3] Nottingham Records i 73, 74.
[4] Ibid 101.
[5] Ibid 175, 176 (1360).
[6] Ibid 263 (1394-1395).
[7] Ibid 355 (1397).
[8] Ibid 231, 232; the case might have been brought before the Constable and Marshal's Court; vol. i 574; note the defendant's plea that the contract was made beyond the seas and was therefore not actionable in England, as to this see vol. i 534, 554; above 307.
[9] Ibid 151 (1352)—here is the bet, "Conventum fuit . . . quod predicti Johannes (plaintiff) et Henricus (defendant) insimul equitarent de villa de Notingham usque villam de West Chastre . . . et de dicta villa de West Chastre redirent super dictos equos usque villam de Notingham absque aliqua mora, ita quod si quis eorum tardius venisset ad villam de Notingham daret alteri prius venienti xxs. argenti die crastino adventus sui."
[10] Ibid 75, 76 (1312-1313).
[11] Ibid 155 (1353).
[12] Ibid 115, 116 (1330).

pated when the breach of a contract of service is sued for by action of trespass.[1]

In the courts of the borough, as in the local courts of the country, the law tends to follow the developments of the common law. Compurgation, it is true, holds its ground; but the jury tends to supersede it.[2] In London we get an assize of "fresh force," which is analogous to the novel disseisin.[3] At Ipswich we get writs of right, of waste, and of nuisance, which are very like the common law remedies.[4] Even in Edward I.'s reign Parliament, as I have said, legislates upon a matter of mercantile custom.[5] But the borough justice was incapable of improvement sufficiently continuous to maintain an effective competition with royal justice.[6] In some points, it is true, the borough customs have modified the common law;[7] but, so far as domestic trade is concerned, they develop no separate code, even for mercantile matters. As we have seen, the most striking illustration of this fact is afforded by the Bristol treatise on the Law Merchant.[8]

(ii) Criminal and police jurisdiction in the borough was organized upon the same model as in the country at large, and it was controlled by the king's courts upon similar principles.[9] We meet, it is true, in some borough custumals survivals of old rules in criminal as well as in civil law. At Preston we hear of the bot.[10] In London, if the accused makes default in a plea of the crown, the pledges are liable for his wer.[11] We read of odd punishments, and of the duty of the injured person to act as executioner.[12] There is much about compurgation.[13] Sometimes the borough court obtained, in later days, a charter which gave it the jurisdiction conferred by the commission of gaol delivery.[14] As a rule it had merely infangthef and utfangthef, and, after

[1] Nottingham Records i 233 (1385); cp. 329, 330 (1396).

[2] This is clear from a study of the cases in vol. i of the Nottingham Records.

[3] Borough Customs (S.S.) i 231, 232; ii cxix-cxxvi.

[4] Domesday of Ipswich 29, 47, 49.

[5] 3 Edward I. c. 23; above 303.

[6] The Municipal Corporations Report of 1835 (p. 42) pointed to this as the great cause for the disuse of these borough courts; another was the fact that the borough court could only levy execution within the limits of its jurisdiction; a third was the want of skill and the partiality of the judges—"a few minutes convert the tradesmen and the customer into the judge and the suitor."

[7] Vol. i 569; vol. iii 273-274.

[8] Vol. i 537-538; Bk. iv Pt. I. c. 3.

[9] Below 396-400; vol. i 141.

[10] Borough Customs (S.S.) i 30, 31.

[11] Liber Albus (R.S.) i 115, "Plegii alicujus de causa quæ pertineat ad coronam, si contigerit quod non possint eum habere ad rectum, nec diem salvere, judicatur unusquisque *a sa Were*—scilicet misericordia centum solidorum."

[12] Borough Customs (S.S.) i 73. See the custumal of Romsey c. 5, cited at p. 74—if the suitor will not execute, "he shall dwelle in prison with the felon, unto the time that he wyll do that office or else find an hangman."

[13] Ibid 36-51.

[14] Municipal Corporations Report (1835) 27.

the rise of the justices of the peace, a special court of quarter sessions for the borough. The boroughs, therefore, do not develop a criminal law different from that of the country at large. It is the same with their police jurisdiction. The system of frankpledge to be found in the London wardmotes is not unlike the system to be found in the sheriff's tourn.[1] The leet jurisdiction of Norwich closely resembles that of a country manor.[2] The Mickletown jury at Nottingham is not unlike the sheriff's tourn.[3] The resemblance to the country at large was strengthened when, in the fourteenth and fifteenth centuries, many boroughs were made into counties.[4] As in the counties so in the boroughs, the justices of the peace gradually ousted the tourn and the leet.[5]

We are not surprised to find that there is much general similarity between the country and the boroughs in respect of the cases which come before these courts. Crimes of violence, breaches of the assize of bread and beer, stirring up suits before the ecclesiastical courts, digging up or obstructing the highway, not being enrolled in a tithing, encroachments upon or obstructions of rights of common are as frequently met with in the boroughs as in the country.[6] The differences which we see in the offences presented are such as naturally arise from the differences between town and country, and from the fact that more cases arise for decision in a more thickly populated area. Selling bad food[7] using bad materials,[8] or unskilful or careless workmanship,[9] fraudulent weights and measures,[10] various species of fraud in buying and selling, forestalling or regrating,[11] acting in a way likely to endanger the liberties of the borough,[12] usury,[13] trading without being a citizen, or, being a citizen, assisting other unlicensed persons to trade,[14] unlawfully forming a gild,[15] complaints against various gilds in which trade might be organized[16]—are

[1] Liber Albus (R.S.) i 37, 38, 90, 97, 99.

[2] Leet Jurisdiction in Norwich (S.S.) xxvi, vii—the leet presentments are made by the chief pledges of the tithings to the four bailiffs—just as in the manor the chief pledges of the tithings make their presentments to the lord's steward; cp. ibid lxix, lxx for a comparison with the London system.

[3] Ibid lxxi n. 1; Nottingham Records i 266-283.

[4] Above 385.

[5] Leet Jurisdiction in Norwich (S.S.) lxxiv-lxxx; vol. i 143.

[6] Nottingham Records i 66, 268-283, 316-323; ii 38-42, 60-64; Leet Jurisdiction of Norwich (S.S.) passim.

[7] Ibid 8, 57. [8] Ibid 17, 28, 48.

[9] Ibid 60. [10] Ibid 13. [11] Ibid 9, 28, 30.

[12] Ibid 29, 30, "De Johanne de Disce quia gratis dat theolonium et consuetudinem in mercatis et feriis contra libertatem civitatis."

[13] Ibid 35. [14] Ibid 44, 48. [15] Ibid 13, 39, 43, 47, 63, 74.

[16] Ibid 60—all these varied presentments may be illustrated in other towns, see Nottingham Records loc. cit. 327 n. 10; Leicester Records ii 175, 176, 178, 181-185; Munimenta Gildhallæ ii pt. ii 444-455, etc.

specimens of characteristic urban presentments. Perhaps the respect in which the presentments in the boroughs diverge most strikingly from the presentments in the country at large is in the space which is occupied by the infringement of by-laws. We meet these by-laws in the country;[1] but they necessarily occupy a far larger space in the boroughs. Thus in 1189 we get for London Fitz Alwyne's Assize—our earliest "Building Act;"[2] and we find many rules as to the repair or demolition of buildings,[3] as to encroachments on another's building,[4] as to fires,[5] and as to many varied kinds of nuisances.[6] In fact, "the mayor and aldermen of London seem to conceive themselves as endowed with almost unlimited legislative power over the whole province of trade and handicraft. And no doubt their ordinances were in many cases well enough obeyed. The individual citizen, the individual 'foreigner,' dared not quarrel with them."[7] Many of these laws were instances of the exercise of those powers over trade possessed by every borough for the good of the community, which were similar to the powers possessed by every manor in relation to agricultural matters. In other cases they were rules which enforced the general principles of the common law as to fair trade. At the same time these by-laws were always liable to be called in question before the king's courts;[8] and this made in the long-run for uniformity. The borough by-laws, thus controlled and supervised, will supply a set of rules in harmony with the principles of the common law; and in later days some of the topics with which they deal will be the subject of lengthy Acts of Parliament.

Whether we look at the civil or the criminal jurisdiction exercised by the borough court we see the causes at work which will make the law observed in the boroughs the common law, and the borough customs merely antiquarian learning. But, in spite of this, the borough community tends to diverge more and more widely from the other communities of the land. Though

[1] Above 378.

[2] Munimenta Gildhallæ (R.S.) ii pt. i 319.

[3] Borough Customs (S.S.) i 279, 280.

[4] Ibid 238, 248, 249.

[5] Ibid 81, 82, in London in 1419, "If any house in the said city be so much alight that the flame of the fire can be seen from outside the house, he who is dwelling in the said house shall pay the sheriffs 40s. in a red purse."

[6] Ibid 245-251.

[7] P. and M. i 645; cp. Beverley Town Documents (S.S.) orders affecting the Butchers 28-30; the Cobblers 30, 31; the Fullers 32; the Bakers 37-40; building trade orders 55-57; orders for Figham pastures 16; cp. the great charter of the community 1, "Noveritis nos in Gilda Aula nostre de Beverlaco . . . in presencia totius communitatis ejusdem villæ, quedam statuta et consuetudines a tempore quo non extat memoria usitata et approbata inspexisse et recitasse;" Domesday of Ipswich, Black Book of the Admiralty (R.S.) ii 18, 19.

[8] Below 398, 400.

the contents of these borough customs and the activities of the borough courts give us some hints as to the causes of this divergence, we must look beyond these rules and activities to other causes if we would discover its real meaning and its essential cause.

The communities of the country at large have common interests. They have a court which regulates local disputes. But it is comparatively seldom that it is necessary for them to take communal action as one body. They are sometimes involved in litigation, and appear by attorney. But we rarely find them performing a legal act, such as making a contract or conveyance. Maitland has said of the common field system of agriculture then prevalent that it is "an arrangement which maintains itself with unhappy ease."[1] We can say somewhat the same of the whole life of these communities. It maintained itself easily, without much conscious effort or action, in accordance with rules and habits so old as to appear sometimes to have become almost instinctive.

When we approach the boroughs we feel that we are approaching a different atmosphere. There is something artificial about the creation of the borough. The inhabitants have met together. They have created assemblies, officials, a code of rules.[2] The borough itself has privileges which it must be constantly on the watch to assert and maintain.[3] Newcastle considered that it should be the only port recognized on the Tyne. It made loud complaint of the prior of Tynemouth, who had set up another port between Newcastle and the sea—to wit, South Shields—"where no port was before."[4] Royal grants of conflicting franchises occasioned disputes and actions at law between the holders of these franchises whether they were boroughs[5] or private individuals.[6] We see, it is true, similar disputes between the lords

[1] Township and Borough 25, 26. It is no doubt possible, as pointed out by Sir Paul Vinogradoff (Manor 372 n. 39), to exaggerate the automatic character of the village community; and, by looking at it too exclusively from the point of view of the royal courts, to exaggerate the amount of individualism to be found therein. The village community throughout its long history needed by-laws and agreements to keep it going (E.H.R. xxxvii 409-413; above 378; below 400). At the same time we may express the contrast between township and borough by saying that the life of the latter was less customary and less automatic than that of the former.

[2] See Gross, Gild Merchant ii 115-123, for the account of what happened at Ipswich in 1200 when John granted the town its charter.

[3] To pass by an encroachment on a franchise was dangerous; it meant that the seisin of it was lost, and its recovery might be a difficult matter, Bracton's Note Book, case 952; cp. cases 294, 577, 1123.

[4] R.P. i 26-29 (no. 17); Moore, Foreshore (3rd ed.) 111-138.

[5] Bracton's Note Book, case 1123—action between the burgesses of Dunwich and the burgesses of Southampton, in which conflicting charters of King John were produced; cp. ibid cases 16 and 145.

[6] R.P. i 20 (no. 7)—action between the abbot of St. Edward and the bailiffs of Southampton as to a right to toll; cp. ibid 156 (no. 14); Y.B. 20 Ed. III. (R.S.) i 150-158.

of franchises in the country at large;[1] but they are fought out over the heads of the community. They do nothing to help the community to realize itself as a distinct and independent body. The grant of the Firma Burgi often meant the grant of numerous miscellaneous rights to property—tolls, the profits of courts, sometimes rents.[2] Contracts and conveyances were made, and actions were brought, with reference to these privileges, profits, and other property belonging to the community.[3] Debts might be due to it from burgesses and others.[4] In the country there is not much need for formal communication between community and community, but one borough will sometimes find it necessary to communicate with another. Thus they will make agreements with other towns as to the interpretation of their customs,[5] or as to the conditions under which trade shall be carried on between them;[6] or, on the complaint of a burgess, they will write to another town, where that burgess's debtor is residing, requesting it to hear the action.[7] The Bristol treatise on the Law Merchant tells us that if a person is sued in the court of a fair, and the defence of *res judicata* in the court of another fair is set up, and to prove the defence the rolls of the court of that other fair are vouched, the one court must write to the other and give judgment according to the rolls so vouched.[8] Sometimes the borough will get from the king the right to levy rates, such as murage and portage.[9] The levy of these rates will sometimes give rise to litigation in the royal courts between the burgess and the borough or the officials of the borough.[10]

[1] E.g. Y.B. 20 Ed. III. (R.S.) i 236-250. [2] P. and M. i 635.

[3] Nottingham Records i 85 (1315-1316), mortgage of the rent of the Retford tolls; ibid 20 (1225), letting of the tolls of the burgesses of Nottingham to the burgesses of Retford; ibid 109 (1330) agreement between the burgesses of Nottingham and William de Colwich as to landing goods at Colwich in time of drought; Beverley Town Documents (S.S.) 135, 136, agreement between the town and the Archbishop of York as to Westwood; below n. 10; P. and M. i 664 n. 2; Bracton's Note Book, case 520—contract with burgesses of Wycombe.

[4] P. and M. i 665 as to Henry III.'s debts to Northampton; Madox, Firma Burgi chap. vii § 10.

[5] Vol. i 140 n. 4.

[6] Munimenta Gildhallæ (R.S.) iii 164-175—agreements between the city of London and the citizens of Amyas (Amiens), Corby and Neele (Nesle).

[7] Borough Customs (S.S.) i 121-125.

[8] Red Book of Bristol, i 80, 81—we seem to see in embryo the rules of Private International law as to the effect to be given to foreign judgments.

[9] Parlt. Roll 1305 (R.S.) 10, 48, 49, 63. These rights were usually granted for five years. When Berwick (ibid 179) asked for a grant of the "custumas, firmas, et proficua molendinorum et aquarum villæ," for twelve years to build a stone wall round the town, the king hesitated.

[10] Madox, Firma Burgi chap. v §§ 23, 24. The former case is one of Edward I.'s reign in which the plaintiffs sued several former mayors of Oxford for assessing undue tallages; the latter is a case of Henry III.'s reign in which rival parties in the town of Staunford sued one another because, as the plaintiffs alleged, they had been made to contribute unjustly to tallages. Cp. ibid §§ 25-27; Bracton's Note Book, case 1640; R.P. i 47 (no. 24), 51 (no. 65); Parlt. Roll 1305 (R.S.) 95.

The borough community is more conscious of its community than other communities. Old customs in force before the Statute of Westminster I.[1] made the burgesses of a borough liable in the court of a foreign borough for the debt of their fellow burgesses;[2] conversely, many towns gave the burgess the right to share in bargains made by fellow burgesses.[3] Occasionally the borough itself considered itself liable to a foreigner for the debt of one of its own burgesses who had made default.[4] As a community it has valuable trading privileges, such as freedom from toll throughout all England, which makes the position of burgess a valuable thing. We find that it makes rules as to the conditions under which persons can become its members,[5] and that it threatens expulsion as a punishment for certain offences.[6] In the borough, therefore, there is more need for frequent common action than in any other community. It is for this reason that it is far more common for the borough than for any other community to possess a seal.[7] The presence of the seal is a clear and easy proof of communal consent.[8]

For all these reasons, therefore, the borough is coming to be a more active, a more self-conscious unit than the ordinary community. It is not as yet regarded as a corporate body—as an artificial person, separate from its members; but it is on the high road to the attainment of that status. Its varied activities are intensifying the resemblance between it and the religious house. They are diminishing the resemblance between it and the ordinary community. As Maitland says, "the idea of an artificial person is already latent in English law, but the lawyers are hardly aware of its presence."[9] It is not till the following century that this foreign conception becomes naturalized in English law.[10]

When the borough has become a corporation, the fact of incorporation will be a just expression of those differences between it and other communities which were already emerging in the

[1] Vol. i 543 n. 7; for a similar form of international liability see R.P. i 200 no. 56.

[2] Borough Customs (S.S.) i 115. [3] Ibid ii lxviii-lxxiii.

[4] Ibid i 126, 127; Madox, Firma Burgi chap. viii.

[5] Beverley Town Documents (S.S.) 10, 11—children born before their fathers have become burgesses are not burgesses, nor are the children of concubines nor those born in adultery.

[6] Domesday of Ipswich, Black Book of the Admiralty (R.S.) ii 157.

[7] P. and M. i 667. In Edward I.'s reign the county of Devon had a seal, ibid i 520.

[8] For this reason town custumals will contain rules as to the fixing of the seal, see, e.g. Beverley Town Documents (S.S.) 12 (order as to sealing testimonials). See Red Book of Bristol 77, for the rules as to the custody of the seal of a fair—"omne mercatum," says the writer, "habet unum commune sigillum."

[9] P. and M. i 660. [10] Vol. iii 469-475.

thirteenth century. It will be an aid to the government and the trade of the borough, and a means by which the state can exercise a larger control over it, rather than a substantial change in the nature of the borough community.[1] Its rights and its duties, and its place in the scheme of English local government, had been fixed in the days before it was a corporation. When it became a corporation its charter in many cases created no new body; it created "the county of the borough or city." As a corporation the lawyers of later days will sometimes speak of it as an entity immortal and invisible. Such doctrines rightly seemed absurd to Madox,[2] who had minutely scrutinized in the records its manifold activities in the days when it was simply a more highly organized species of that large genus community which flourished so exceedingly in the England of the thirteenth century. But of the attitude which English law was assuming both to the boroughs and to the other local communities, I shall be able to say something more, when I have examined the various ways in which they were being affected during this period and the next by the pressure of the common law.

III. The Effect of the Growth of the Common Law upon the Local Courts and the Local Communities

It is clear that the law administered by these local courts rural and urban is becoming, both in its administration and its subject matter, a fixed and regular system. We are fast leaving behind us the time when all law outside that administered in the

[1] Madox, Firma Burgi chap. ii § 6, "The encorporation fitted the Townsmen for a stricter union amongst themselves, for a more orderly and steady Government, and for a more advantageous course of Commerce;" so Stubbs, C.H. iii 632, 633, "These new charters were, however, required in many instances to give firmness and consolidation to the local organizations which had been up to this time a matter of spontaneous and irregular growth. . . . Before the complete charter was devised, some towns, Shrewsbury for instance, had procured an Act of Parliament to secure their local constitutions; it was on the whole easier to procure a royal charter."

[2] Firma Burgi chap. ii § 17, "For I perceive this hypothesis of the absolute Immortality of Cities or Communities, being countenanced by Great Men's names, is creeping into Books of the *Common Law*, and other Books. It is likely I may hereafter, in a future Work, enquire whether a Royal Charter of Encorporation hath in it so singular a vertue, as to make a Society of Mortal men, Immortal, Invisible, and Incorporeal;" Sir F. Pollock says, L.Q.R. xvii 96, "Now we may doubt whether the courts left to themselves in the light of merely Germanic principles would ever have recognized a person where there was not a visible body. Fourteenth century judges were not modern philosophers, but the kind of men who fortified themselves by a good grip on the handle of the church door when they were going to deal with such an elusive spiritual thing as an advowson. Without the Roman Universitas and the accompanying 'fiction theory' we should perhaps have had no corporation at all, but some device like the equity method of an individual plaintiff suing 'on behalf of himself and all others,' in the same interest;" cp. Stubbs, C.H. iii 632, "The acquisition of a formal charter of incorporation could only recognize, not bestow these rights."

king's court is a mere chaos of conflicting customs. Nor is it difficult to see that it is the energy, the example, and the constant interference of the common law, administered by strong central courts, which is the cause of this phenomenon. I shall say something firstly of the directions in which the common law made its influence felt, and secondly of the effects of that influence upon the local communities.

The Directions in which the Common Law made its Influence Felt

The common law has (1) defined spheres of jurisdiction, (2) controlled the exercise of jurisdiction, and (3) has, as a consequence, rendered a regular procedure and a uniformity of rule an absolute necessity. Country and borough alike felt these influences in different degrees.

(1) The common law defines spheres of jurisdiction.

We have seen that the Quo Warranto enquiries tended to settle the sphere within which the courts of the franchises could exercise their jurisdiction.[1] Similarly, statutes like the Statute of Gloucester tended to fix and to limit the sphere of the communal courts;[2] while the various methods employed by the king's court to gain exclusive jurisdiction over cases relating to the ownership or possession of land of free tenure tended to limit feudal jurisdiction, and, by so limiting it, to produce the manorial jurisdiction of later law.[3]

The Quo Warranto enquiries affected the boroughs as they affected the rest of the country. Many of the boroughs claimed extensive franchises, sometimes not unlike those claimed by landowners throughout the country.[4] In fact, seigneurial jurisdiction in some cases survived within their walls, while others, for instance Leicester, were entirely under the control of a lord.[5] Like other holders of franchises they were liable for unreasonable or unlawful user of their privileges. In the Liber Custumarum and the Placita Quo Warranto there is a long account of the Eyre of 14 Edward II. held at the Tower of London.[6] The city was obliged to appear and strictly prove its franchises, and answer for any excessive or unlawful user of which it could be

[1] Vol. i 88-90, and App. XIX; and cp. R.P. i 117, 118, 148, 149. The numerous cases in the Y.BB. in which a distraint was questioned constantly brought the existence and the modes of user of the franchise and other jurisdictions before the royal courts; see e.g. Y.B. 20 Ed. III. (R.S.) i 390-397.

[2] Vol. i 72-73.

[3] Ibid 178-179.

[4] Above 392-393.

[5] Above 385.

[6] Mun. Gild. (R.S.) ii 285-430; P.Q.W. (R.C.) 445-474. In ordinary cases also there was a tendency to construe charters strictly, see Y.B. 20 Ed. III. (R.S.) i 116.

proved to be guilty. The jurisdiction of the borough courts was not, however, so strictly limited as that of the communal or feudal courts. Their position was more like that of the exalted franchise jurisdictions. Their charters gave them in many cases civil jurisdiction over all matters arising within the borough, as well as a limited criminal jurisdiction.[1] Great jealousy was entertained of allowing any rival jurisdiction of king or lord; and in some cases we find express prohibitions against suing outside the borough court.[2]

(2) The common law controls the exercise of jurisdiction.

Perhaps, however, the tendency in the direction of the settlement of the law administered by these local courts is due even more directly to the manner in which the king's courts controlled the exercise of their different jurisdictions. In civil cases writs of Pone, Error, or False Judgment frequently brought their doings before the royal justices.[3] Both in civil and in criminal cases the proceedings of the justices in Eyre and the justices of assize brought the methods and the principles of the central courts to the knowledge of all Englishmen—often in the very practical form of an amercement for some sin of omission or commission.[4] The customs of county, hundred, and manor might differ; but it is becoming possible to lay down general rules upon such matters as pleading, enrolment, and essoins.[5] In all the branches of the law administered by them there is a tendency to follow the methods and the rules of the royal courts.

No doubt in the case of the boroughs the control of the royal courts was less extensive. But the boroughs could never entirely exclude royal justice. They were, as Gross has said, "integral portions of the body politic over which the king ruled."[6]

[1] Vol. i 142-151; P. and M. i 628, 629; see e.g. the charter of Ipswich granted by John, Gross, Gild Merchant i 7, 8.

[2] Domesday of Ipswich, Black Book of the Admiralty ii 150, 151; Liber Albus, Mun. Gild. (R.S.) i 474. At Ipswich no tenant of land in the town was to do homage or fealty to the lord of whom it was held, Domesday of Ipswich 141.

[3] Vol. i 73-74, 178. See an instructive case of False Judgment in Y.B. 32, 33 Ed. I. (R.S.) 360-366, in which the suitors alleged that the lord's steward had by threats prevented them making a record; Y.BB. 11, 12 Ed. III. (R.S.) 502, 516; 14 Ed. III. (R.S.) 292; 18, 19 Ed. III. (R.S.) 1-4; 20 Ed. III. (R.S.) i 204; cp. 3, 4 Ed. II. (S.S.) 2, a Recordari from a court of Ancient Demesne; 6 Ed. II. (S.S.) i 41-44, an allegation of failure of justice in the court of a liberty of the abbot of Fecamp.

[4] Vol. i 270-271.

[5] The Court Baron (S.S.) 68, 80, 86; Bracton f. 329 states that in some matters the practice of the king's court must be followed by the feudal courts, "in visu petendo, et in warranto vocando, aliquando et in exceptionibus proponendis, et in duellis vadiandis, et in omnibus aliis quæ in curia dominorum terminari possunt et debent, observari debent prout in curia regis observantur,"—it is otherwise, he says, as to summonses and essoins, in which matters each court has its own customs.

[6] The Gild Merchant i 280; Bracton's Note Book case 1392—Recordari facias (vol. i App. IX.) from the town of Cambridge.

It might be difficult for an individual burgess to appeal from his borough court to royal justice ;[1] but the boroughs themselves, like any other community, were constantly liable to legal proceedings at the suit of the crown, which often resulted in forfeiture of the borough charter ;[2] and their actions sometimes afforded ground for a presentment before the itinerant justices,[3] or furnished private persons with a pretext for taking legal proceedings against some of their members.[4] In Edward I.'s reign the city of London was taken into the king's hands and he made ordinances for it by his royal authority.[5] In 1377 it tried in vain to get the right to interpret its own charter.[6] Many various quarrels—disputes between political parties,[7] between rival trades,[8] between the town and its mesne lord,[9] between the mesne lord and the crown [10]—ended in an appeal to royal justice. Indeed, the town itself sometimes called in that royal justice, and not always successfully, to enforce obedience to its own by-laws.[11] Thus, in the boroughs as in the country at large, the rules and methods of the common law were constantly in evidence, and shaped, perhaps half-unconsciously, the law therein administered.

(3) The control of the common law produces uniformity of rule.

We can see from the court rolls, from the pleas of false judgment, from the books written to instruct stewards who held their

[1] P. and M. i 648—speaking of appeals against borough rates. They did some times appeal to the king's court if they thought they were treated oppressively, e.g. by the Gild Merchant, Gross op. cit. ii 177-182, citing cases of 1279, 1280; or by the borough court, Bracton's Note Book case 489.

[2] Plac. Abbrev. 273—proceedings against the mayor of Sandwich for asserting by violence certain franchises which he claimed; Madox, Firma Burgi chap. v; Northumberland Assize Rolls (Surt. Soc.) 369, "De burgo de Novo Castro pro concelamentis et aliis transgressionibus drapariis, vinetariis, et pro transgressionibus xii juratorum *xli*. De eodem burgo pro libertate sua rehabenda c *m*."

[3] Northumberland Assize Rolls (Surt. Soc.) 359—a complaint that the burgesses of Newcastle distrain persons who are neither debtors nor pledges "contra communem justiciam."

[4] Ibid 296, 297—a case of trespass which turned out to be merely a distress ordered by the Newcastle court.

[5] Liber Albus, Mun. Gild. (R.S.) i 280 note.

[6] R.P. iii 28 (1 Rich. II. no. 131); cp. 49 Ass. pl. 8, and Nicholas ii 290 for extensive claims to make by-laws. For the powers given to the governing body of Norwich to make by-laws see Coke, Fourth Instit. 257.

[7] P. and M. i 643; cp. Beverley Town Documents (S.S.) xxix-xxxiii for such disputes in the latter part of the fourteenth century.

[8] Mun. Gild. ii 385 (the fishmongers); ibid 416-424 (the weavers); ibid 428, 429 (the cappers).

[9] Green, Town Life i 338-367 (Exeter); ibid 368-383 (Canterbury).

[10] Y.B. 14, 15 Ed. III. (R.S.) 184—as to the rights to escheat in Bristol.

[11] Y.B. 2, 3 Ed. II. (S.S.) 120—an action of trespass by the commonalty of London against one who had broken a civic ordinance by being a common forestaller.

lords' courts, from the various borough records, how large a body of law is still administered in these local courts. And that law was technical law. We read that in 1269 the villeins of the township of Wyke paid eight shillings a year to the king "pro pulchre placitando" in the court of the hundred of Salmanesberie.[1] No doubt in the country at large the more important cases were tending to find their way to the royal courts. But much was still left. The large class who held by unfree tenure could not bring real actions in the royal courts; and the 40s. limit fixed by the Statute of Gloucester for personal actions was not yet a low limit.[2] These courts administered, it is true, a customary law; but it was a customary law which was tending to uniformity. The sheriffs were obliged to attend twice a year at the Exchequer, and were thus brought into contact with the latest legal ideas.[3] The lord's steward will overrule customs which seem to him to be unreasonable.[4] In fact, these stewards, who go round the country administering the same justice and the same rules to manors situate in many different counties, are doing in a humbler sphere what the king's judges are doing on a greater scale for the whole country.[5] The tracts which detail their duties will sometimes endeavour to set as high a standard of duty before them as the larger treatises on the practice of the royal courts set before the royal judges.[6]

In Edward I.'s reign it is still true to say of the boroughs that each had in many respects a separate history, a separate constitution, and a separate set of customs.[7] The fact that they were chartered franchises prevented their law from becoming assimilated to the common law so easily and so quickly as the law administered by the other local courts. But even in the boroughs the settled forms under which the law was administered, the practice of adopting wholesale the customs of other boroughs,[8]

[1] Eynsham Cart. i no. 392. [2] Vol. i 72-73.

[3] P. and M. i 164; they will sometimes take the opinion of the Council in difficult cases, Royal Letters (R.S.) i 103 (there cited).

[4] The Court Baron (S.S.) 134—a custom that a surrender is not valid without the consent of the tenant for life, the father of the surrenderor, is ignored.

[5] P. and M. i 164, "If a manorial extent be put into our hands, only after a minute examination of it shall we be able to guess whether it comes from the west or from the east, from Somersetshire or from Essex." Cp. The Court Baron (S.S.) 121, 122 for a letter of the Bishop of Ely to his steward very much in the style of a royal writ.

[6] The Court Baron (S.S.) 69, 70, "He should be true in word, just in judgment, wise in council, faithful in trust, strenuous in deed, eminent in kindness, and excellent in all honourableness of life . . . and so from his little bailiwick he shall be transferred to a kingdom by Him who taketh the needy from the dust, and lifteth up the poor out of the mire, and so he may sit with princes and hold a throne of glory."

[7] Stubbs, C.H. ii 236; Gross, Gild Merchant i 72, 73; vol. i 138-142.

[8] Vol. i 140-141. Ricart, the town clerk of Bristol, who composed a calendar (1479-1508) gives an account of the London Hustings jurisdiction in real actions, and of the London Sheriffs' and Mayor's court, Borough Customs (S.S.) xxxviii; cp. E.H.R. xv 72, 302, 496, 754; xvi 92, 322, for the laws of Breteuil and their influence.

similar types of charter, parliamentary legislation, were influences which in the two following centuries made for uniformity. Moreover, we can see in the boroughs another cause, operating more strongly than in the country at large, which tended to bring the borough customs up to the standard of the common law. In the boroughs there were many opportunities for the making of by-laws and for the formation of customs for the due regulation either of trade or of municipal government.[1] By-laws, it is true, are made and customs are formed in the manor;[2] but they affect a more dependent class, and they have less general importance. The common law has fewer opportunities of expressing its opinion upon the reasonableness of rural by-laws and customs. It can and does do so on occasion;[3] but it is clearly the borough customs and by-laws which will afford the most scope for interference of this kind. Thus in 1279 the king's justices found a custom of the burgesses of Bamborough and Wearmouth as to distraint for debt to be wholly contrary to all law.[4] At Derby in 1330 certain customs of the gild merchant were declared to be illegal.[5] The citizens of London found that the inconvenience of a law and even long judicial practice could not excuse disobedience to the express provisions of a statute.[6] In Henry VI.'s reign statutory provision was made for securing that the ordinances made by gilds, fraternities, and other companies corporate were reasonable and lawful.[7]

In all these ways and for all these reasons it came to pass that the law administered by the local courts absorbed much of the spirit of the common law. Sir F. Pollock has remarked upon the power of the common law to impose its own conceptions upon other systems of law. He has shown that it has used this power in modern times upon a large stage.[8] It was showing this same power upon a smaller stage, but never more actively than in the reign of Edward I. and in the two following centuries.

[1] Above 391. [2] Above 392 n. 1.

[3] Coram Rege Roll no. 132 Pasch. 20 Ed. I. m. 6d, cited P. and M. ii 623, 624, a custom was said to be "injuriosum et non per aliquod birlawe (by-law) sustinendum;" Y.B. 11, 12 Ed. III. (R.S.) 330, 332; above 378 and n. 9.

[4] Northumberland Assize Rolls (Surt. Soc.) 353; ibid 352 for another custom of the burgesses of Bamborough pronounced to be illegal; Mun. Gild. (R.S.) ii Pt. i 333-338, an illegal custom of the city of London; R.P. i 202 (35 Ed. I. no. 66)—the city of York was ordered to readmit burgesses who had purged their offence by paying a fine to the crown; Y.B. 2 Hy. IV. Pasch. pl. 16, a practice of the city of Lincoln was declared illegal.

[5] P.Q.W. (R.C.) 161—a tyrannical user of the powers of the gild merchant for their own profit and not for the common profit of the town.

[6] Mun. Gild. (R.S.) ii Pt. i 169-178.

[7] 15 Henry VI. c. 6.

[8] Expansion of the Common Law 16-19.

The Effects of the Influence of the Common Law upon the Local Communities

Many and varied are the forms of community which existed in the thirteenth century. There are townships and manors, hundreds and counties, franchises of various kinds, and boroughs, and over all is the community of the whole realm.[1] The law and the lawyers of this period accept the existence of these communities without speculating as to their nature, and without stopping to arrange them in distinct categories. They seem to regard them as part of the natural order of things; and enquiries into their nature, into their capacities or incapacities, they would consider foreign to the business of the lawyer—as foreign as we might consider biological enquiries into the mental or physical constitution of normal human individuals. Communities and individuals were in their eyes the subjects of legal rules possessed of varied rights and capable of varied forms of wrongdoing. They did not stop to analyse and compare the resemblances and the differences between the individual and the community. This absence of speculation has often been a stumbling-block to us moderns. Our heads are full of philosophical discussions about communalism and individualism, about the nature of the state, of corporations, and of the other varied groups which flourish within the state, carried on with the help of abstract terms which those very speculations have created.

The different mental attitude of the lawyers of the thirteenth century and later is due in part to the fact that the common law was becoming a definite system at a time when society was still organized in various kinds of communities, possessing each a life of its own, in many respects distinct from and independent of that of the state. Men do not stop to analyse the common things of daily life. In fact, just as the primitive conception of law as a rule of conduct binding all alike, ruler as well as subject, became a part of the common law because it was in the air at the early period when the common law was becoming a definite

[1] Gierke, Political Theories of the Middle Age (*tr.* Maitland) 20, 21. "If, however, mediæval thought . . . postulated the visible unity of mankind in Church and Empire, it regarded this Unity as prevailing only up to those limits within which Unity is demanded by the Oneness of the aim or object of Mankind. Therefore the Unity was neither absolute nor exclusive, but appeared as the vaulted dome of an organically articulated structure of human society. In Church and Empire the Total Body is a manifold and graduated system of Partial Bodies, each of which, though itself a whole, necessarily demands connexion with the larger Whole. . . . Between the highest Universality or 'All-Community' and the absolute Unity of the individual man, we find a series of intermediating units, in each of which lesser and lower units are comprised and combined."

system,[1] so, for the same reason, the presence of these communities was accepted as part of the natural order of things; and their doings, like the doings of individuals, were ordered as seemed to the judges and statesmen of this period reasonable and expedient. In part this mental attitude is due to what those who maintain theses call the illogical, and those who have no theses to maintain call the practical, character of the common law. Sir F. Pollock[2] has said in another connection that English law "has grappled more closely with the inherent vagueness of facts than any other system." This phrase well describes the reasons for the peculiarly untheoretic and practical manner in which English law has dealt with these various communities. The facts of common life are often illogical. They are the raw material which by careful selection and varied intellectual processes can be worked up into many conflicting legal theories. But if the law is to be practical and useful it must often reflect in its rules something of the inconsequent characteristics of the phenomena with which it is conversant.[3] It can have no neatly labelled theories dear to the philosopher's mind; and the historian will often present a truer picture of the past if he can, like Madox, let the records tell their tale, than if he approaches his task with his mind filled by various modern theories, political or philosophical. Now, as in the thirteenth century, the common law deals with miscellaneous groups—clubs, trade unions, Inns of Court; and the rules which define their rights or punish or pardon[4] their wrongdoings are dictated, as they were in the thirteenth century, rather by expediency than by any other principle.[5] In this branch of law, as in many others, the actual rules of English law, like the actual rules of Roman law, afford abundant material for the conflicting theories of the scientific jurist.

There is one caution which we should observe in dealing with these communities of the thirteenth century. From their

[1] Above 252-255.

[2] Pollock, Torts (5th ed.) 33, 34.

[3] We may see an illustration of this in the comparison between the various theories which have been constructed to explain the protection of possession and the actual historical reasons, vol. iii 95 and n. 5.

[4] In 1382 Beverley and Scardeburg got charters of pardon, R.P. iii 135 (no. 19).

[5] Cp. Taff Vale Railway Company v. Amalgamated Society of Railway Servants [1901], A.C. 426. In Y.B. 20, 21 Ed. I. (R.S.) 90 there is an account of a suit brought by the abbot of Reading and his men. It was objected that separate actions should have been brought by each man; the court said that the franchise which they claimed had been given on account of the abbot; he was the principal; and that the action was well brought in that form. As Professor Dicey has said (Law and Opinion 153), "Whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted." How the law can best regulate these bodies is another matter, see vol. iii 478-479.

condition in that century we should be careful not to draw sweeping inferences as to their condition in earlier centuries.[1] No doubt it is sometimes proper and even essential to read our history backwards—to work from the known fact to the obscure origin. But we should be careful to see, when we pass in our backward career to other periods, that we do not unconsciously allow ideas which belong to the period we are quitting to usurp the place of the ideas which belong to the period at which we are arriving. We should be careful to avoid drawing from the form of the varied communities of the thirteenth century far-reaching conclusions as to the nature of these or similar communities in the period before they were regulated by a masterful common law. The older communities of the tenth or eleventh centuries were based upon the political or economic needs of a society which possessed a communal system of agriculture,[2] but no strongly organized central authority. In that society, the powers of government were, as we have seen, split up among the communities of the land.[3] The communities of the thirteenth century were subject to an organized state. They represent either the economic needs of the agricultural system then usual, or the need of the state for some machinery of local government, or the need of merchants for some form of trade organization. They are subject to the judicial and political power of the state, and they are controlled by it. The organization and the doings of these communities, moulded and controlled by a centralized system of law and government, tell us little of the theories that lay at the back of the older communities. But they tell us much of the growth of a common law which is coming to regulate the relations of all within the state—individuals and communities alike. Such a common law is the great solvent of the older ideas which left the greater part of the law to the special customs of various communities.

Man is a political animal; and whether he lives in the tenth, the thirteenth, or the twentieth century he will always form communities of one sort or another. The nature and the character of these communities differ fundamentally at each of these three different periods. In the tenth century a man's life is for the most part irrevocably ruled by the customs of the community into which he is born. In the thirteenth century he cannot, however he is grouped, whether by birth or by choice, escape the influence of a common law. The communities of the land, however, still have an independent life. They still perform

[1] Cp. Maitland, The Survival of Archaic Communities, L.Q.R. ix 36, 37.
[2] Above 56-61. [3] Vol. i 17-18, 21-23, 24-27.

many of the functions of government freely and after their own fashion—but subject to the law. In the twentieth century a man may at his own free will join what groups he pleases and leave them as he chooses. The progression, in the case of communities as in the case of individuals, is from status to contract. In this last period it is not through such groups that the work of local government is done. The local government tends more and more to fall into the hands of special officials and special organizations whose powers are exercised simply as delegates of the sovereign state. It tends to become less communal and more bureaucratic.[1]

The thirteenth century therefore stands midway between the undiluted communalism of the earliest period and the bureaucratic ideas of the latest. The English state and the common law recognize and use these semi-independent communities of the land. Subject to its rules, which are as yet by no means detailed,[2] they can act freely. We may well regard the changed character of these communities of the land by means of which the local government is carried on, local jurisdiction is exercised, and trade and agriculture are organized, as the most striking of the achievements of the common law. They are subordinated to law without losing their individual character and their independent life. Because they date back to the period before a separation has been made between judicial and administrative functions they carry on the work of government under judicial forms; and when the justices of the peace took over most of their administrative functions the old communal divisions and the judicial forms were still retained. This further emphasized the fact that they are subject to the ordinary law of the land, and to that law alone, and helped to secure the continuance of their free discretion in the exercise of their powers.[3]

[1] See the contrast pointed out in Political Theories of the Middle Age 98-100, "Political and Philosophical theories could find no room whatever in their abstract systems for feudal and patrimonial powers. This was just the point whence spread the thought that all subordinate public power is a mere delegation of the Sovereign power. . . . A similar attitude was taken . . . in relation to those independent rights of Fellowships [i.e. communities] which had their source in Germanic law. . . . The doctrine of the State that was reared upon a classical groundwork had nothing to say of groups that mediated between the State and the Individual . . . all intermediate groups were first degraded into the position of more or less arbitrarily fashioned creatures of mere positive law, and in the end were obliterated;" cp. Dicey, Law and Opinion 305, 306; Gneist, C.H. ii 467-471.

[2] P. and M. i 645, 646—it is said with reference to the by-laws of the boroughs in the thirteenth century that "the common law does not come to close quarters with municipal by-laws," and so we get "no jurisprudence of by-laws."

[3] Redlich and Hirst, Local Government ii 54, "It was in consequence of this choice of a judicial person as an intermediary between the state and its citizens that provincial administration, which has been conducted in continental states without regard to the law by the absolute decree of the prince and his Council, was built up by the English Parliament on the ground of the common law, and has been from the first an essential ingredient in the statutory laws of the land."

The fact that English local government was based upon communities of this type, and not upon bodies which acted as mere delegates of a sovereign state, constitutes, as Gneist has pointed out,[1] the peculiarity of English "self-government;" and it is to our system of self-government that the success of Parliamentary government is largely due. Thus we can say that the precocious development of our common law has, by preserving certain ancient ideas, given the opportunity for the development of a peculiar mode of local government based upon these old independent communities, a peculiar position to the common law as the sole controller of these organs of local government, and a Parliament representing these communities which has become a model to the civilized world: it has given, in other words, the opportunity for the development of those two fundamental characteristics of our English constitution—the system of self-government and the rule of law. If the early influence of the Roman law has assisted in the precocious development of the common law, the speedy cessation of that influence has allowed the more primitive ideas which the common law still retained to take new life and to make fresh developments—developments without which the world's stock of legal and political ideas would have been the poorer.

[1] English Constitution ii 112.

CHAPTER V

THE FOURTEENTH AND FIFTEENTH CENTURIES

The Working and Development of the Common Law

THE sphere of common law jurisdiction has now become definitely fixed; and, during these centuries, the steady working of the machinery of the common law systematizes and develops those branches of the law which fall within it. Outside its sphere we see at work those same processes of differentiation and specialization, which in times past had given rise to the common law jurisdiction, gradually developing a separate system of equity and a separate system of maritime and commercial law. These legal developments were affected by a gradual weakening in the coercive strength of the government, and a growing tendency either to pervert the processes of the law or to disregard its authority, which, in the following period, will lead to a reorganization of the constitution, and, consequently, to considerable additions to, and changes in, the mutual relations of all branches of English law. These are the main features and tendencies in the legal history of this period.

The history of the subject matter of the common law during this period is a history of steady development along the lines marked out by Edward I.'s legislation. There is no such rapid expansion as marked the twelfth and thirteenth centuries. Rather we see an elaboration of the machinery of process and of the rules of pleading, and a detailed working out of principles already established in the thirteenth century; and this, as we shall see, was also characteristic of the contemporary continental school of the commentators or post-glossators.[1] The independence of the common law was secured by the growing power of Parliament, so that the process of development proceeded continuously and logically with little external interruption. It is true that this very independence tended to produce a somewhat technical and cramped development. But, just as in the sphere of administration the machinery of government continued to move, and even to be improved by the experience of the officials who worked it;[2]

[1] Bk. iv Pt. I. c. 1.
[2] Tout, Reign of Edward II. 24-25, 157 seqq.

so, in the sphere of law, the new needs of the nation gave rise to a new equitable jurisdiction [1] and to a new admiralty jurisdiction,[2] which, being new, were not as yet completely fettered by technical forms; and we shall see that there are signs at the end of the period that the competition of these rival courts was making for a freer and a more liberal development of the common law itself.[3] The result could be regarded with approval and pride not only by optimistic judges learned in the law,[4] but also by foreign observers,[5] and by historians of later ages.[6] That the common law had become a system worthy to stand beside the civil and canon law was the opinion of one of the four greatest schoolmen of the fourteenth century.[7] "It is clear," said Wyclif, "that as much learning and philosophy are found in a judge of the common law as in a doctor of the civil law;"[8] and if we confine our view to the limited horizon of the judges, serjeants, and apprentices of the common law, and contemplate the legal principles which they were developing, we may see some cause for this complacency. A glance at the turbulent world outside will make us pause, and reflect somewhat upon the detachment of these principles about which such words of praise could be spoken.

We see, indeed, much material prosperity. The country was free from foreign invasion. But we see a gradually diminishing efficiency in the government, a gradually lessening respect for the law.[9] When political passions ran high both parties took the law into their own hands. Edward III.[10] and Richard II.[11] declined

[1] Vol. i 397-409. [2] Ibid 544-546. [3] Below 454-456, 593, 595-596.

[4] Fortescue, De Laudibus c. xviii, "Ye shall see none in the whole world of like excellence."

[5] Comines, Mémoires Bk. v c. xviii, speaking of England, says, "Or, selon mon advis, entre toutes les seigneuries du monde, dont j'ay connoissance, où la chose publique est mieux traictée, et où règne moins de violence sur le peuple, et où il n'y a nuls edifices abatus ni demolis pour guerre, c'est Angleterre; et tombe le sort et le malheur sur ceux qui font la guerre;" so Tout (Edward II. 238) says of that reign that even in its worst period "the machinery of administration went on as usual. . . . The judges went on circuit, or sat at the courts at Westminster or York, just as regularly, and worked through their lists just as carefully, as if all had been well with the state;" but cp. Cunningham, Industry and Commerce i 455, who gives some reasons for thinking that Comines' view that "tombe le malheur sur ceux qui font la guerre" is not wholly true.

[6] Reeves, H.E.L. ii 654; but see Stubbs, C.H. iii 291-292.

[7] "Dun Scotus, Ockham, Bradwardine, and Wycliffe were the four great schoolmen of the fourteenth century," Fasc. Ziz. (R.S.) li.

[8] De officio regis 193, 194, "Sed non credo quod plus viget in Romana civilitate subtilitas racionis sive justiciæ quam in civilitate Anglicana . . . patet quod non pocius est homo clericus sive philosophus in quantum est doctor civilitatis Romane quam in quantum est justiciarius juris Angliæ;" cp. L.Q.R. xii 76.

[9] Stubbs, C.H. iii 300.

[10] In 1341 Edward III. revoked a statute which he had passed in return for a money grant, alleging that it was in prejudice of his prerogative, and therefore void, Stubbs, C.H. ii 426.

[11] In 1387 Richard II. got an opinion from the judges that the commission of reform to which he had assented injured his prerogative and was therefore void, Stubbs, C.H. ii 520, 521; below 445 n. 5, 560.

to be bound by laws which seemed to them to limit unduly their prerogative. Parliament in 1388 declared that, even when acting judicially, it was not bound by the ordinary laws[1]—a principle which is perhaps illustrated by the acts of attainder characteristic of the Wars of the Roses. What the king and what Parliament did in the fourteenth century the great nobles did in the fifteenth century; and it is no exaggeration to say that by the middle of the fifteenth century the rules of the common law were either so perverted in their application, or so neglected, that they had ceased to protect adequately life and property.[2] Fortescue, who sang the praises of the laws of England, who gloried in the *regimen politicum et regale* exemplified in a king whose powers to legislate and tax were limited by Parliament, was obliged to confess, when he looked at the political condition of the country, that it would be well to strengthen the royal power.[3] Excellent as the laws of England were, they were of little avail because they could not be enforced.[4]

It is this curious combination of legal development with political retrogression which is the distinctive characteristic of these two centuries. In order to explain its causes I must make a brief trespass upon the domain of political and constitutional history.

The history of this period shows us very clearly that the creation of a law-abiding instinct is the painful work of centuries of efficient rule, and that only those peoples who have acquired this instinct can safely be trusted with the liberty of governing themselves. The necessary training had, as we have seen, been well begun by the rule of such kings as William I., Henry I., Henry II., and Edward I.—but it had only begun. The administrative system had been solidly organized;[5] but the rise of Parliament had limited the powers of the crown; and, thus controlled, even a strong and able king found efficient government no easy task. The king and his council were the heads and centre of the administration. He and his ministers conducted the government and were responsible for its administration. But there were certain matters, such as taxation and legislation, for which the co-operation of Parliament was required; and Parliament could make its voice heard if the conduct of the govern-

[1] R.P. iii 236, "Que en si haute crime come est pretendu . . . la cause ne serra ailours deduc q'en parlement, ne par autre ley et cours du parlement . . . et auxint lour entent n'est pas de reuler ou governer si haute cause come c'est appell est . . . par cours processe et ordre use en ascune court ou place plus bas deinz mesme le roialme, queux courtes et places ne sont que executours d'aunciens leys et custumes du roialme et ordinances et establissementz de parlement;" for this idea in later law see vol. i 384.

[2] Below 414-416.

[3] Fortescue, Governance of England chaps. iii and ix; Plummer's Introd.

[4] Stubbs, C.H. iii 291-292.

[5] Tout, Edward II. 29-30.

ment was seriously distasteful to the nation. The nation was willing to support a government which combined strength and efficiency with respect for the rights and privileges of Parliament. But the government took its character from the king; and efficient government under these conditions required a king of tact, strength, and administrative ability. Edward I. possessed this combination of qualities; but even he had had a hard struggle with his rebellious barons, and, when he died, the country was bankrupt.[1] If indeed he had lived long enough to have borne down all opposition at home, and to have brought the war with Scotland to a successful issue, he might have gone down to history "as the organizer of despotism, not as the pioneer of constitutionalism."[2] All danger that English history would take this course disappeared with his death. King and barons were fairly equally matched; and remarkable as was the dynasty of the Plantagenets in many respects,[3] no one of his successors possessed Edward I.'s genius for government. Even a slight defect in the character of the king disturbed the mechanism of government, and a serious defect threw the machine out of gear. If the king was incapable the nation sided with the baronage, and either put the powers of the crown into commission, as in 1310, or deposed the king, as in 1327. The same results followed if the king attempted to override the rights of Parliament and to establish a despotism, as the events of 1386 and 1399 showed. The cost of an aggressive foreign policy, such as that pursued by Edward III. and Henry V., led to the acquisition by Parliament of increased powers; and a royal minority produced the same result. But there was danger in the powers which Parliament was able for these varied causes to assume. No doubt the knights of the shire, who were, at this period, the most active members of the House of Commons, desired efficient and constitutional rule; but the complexion of Parliament, and therefore its aims, were often largely coloured by the influence either of the king or of the great nobility.[4] When the king was weak, or when for any reason his policy or its results displeased the nation, a powerful faction of the nobility could use Parliament to promote its selfish ends. Thus it was that the continuous growth of Parliamentary privilege and power, founded upon royal weakness

[1] Tout, Edward II 37-38. [2] Ibid 32.

[3] Stubbs, C.H. iii 547, "Few dynasties in the whole history of the world, not even the Cæsars or the Antonines, stand out with more distinct personal character than the Plantagenets. Without having the rough, half Titan, half savage majesty of the Norman kings, they are, with few exceptions, the strong and splendid central figures of the whole national life."

[4] As Stubbs puts it, C.H. iii 6, the Parliament becomes a mere engine which stronger forces in the nation can manipulate at will.

or unpopularity, led, not to the establishment of constitutional rule, but to the anarchy of the Wars of the Roses.

A rapid survey of the reigns of the English kings from Edward II. to Richard III. will illustrate the working of these principles.

Edward II. was the most incapable of the Plantagenets. The great nobles led the attack upon him; and they carried with them the nation, which was irritated by the failure of his government. His powers were entrusted to a committee of barons in 1310;[1] and in 1327 he was deposed. He could not, for any length of time,[2] unite the nation round him. But, though his deposition was assented to by Parliament, it was brought about by his guilty wife and her paramour, Mortimer. Factions of the nobility, personal hatreds, and personal ambitions were at the back of the constitutional action of Parliament.

Edward III. governed England as a strong king during the greater part of his reign. His expensive military policy led to the growth of the powers of Parliament. At the same time his creation of new peerages, and the matrimonial alliances which he made for his children, raised up a new nobility, who, as Stubbs says, "adopted the prejudices and principles of the elder baronage."[3] By the establishment of new orders of knighthood, and by gorgeous ceremonial and display, he tried to imitate the chivalry of an age that was passing away—"an undefinable air of the old fashioned," it has been said, clings to the knight of the Canterbury Tales. This new nobility gained power, not, as in the old days, because they were the hereditary chiefs of the districts from which they took their titles, but because the financial exhaustion caused by the war made the crown dependent upon them. The very time when the crown was thus weakened was a time of social upheaval. The economic effects of the Black Death and the teaching of the Lollards seemed to loosen the foundations of society and religion. And, while Edward himself was sinking into a decrepit and dishonoured old age, the factions of the new nobility were able to profit by the disorders of the state by making use of the powers of a Parliament which they were able alternately to manipulate. We want

[1] That this method of dealing with constitutional difficulties was in the air at this time is clear from the passage "De Casibus et Judiciis difficilibus" in the Modus Tenendi Parliamentum, Sel. Ch. 506-507; for this tract see below 424-425.

[2] Possibly he attempted to do so in 1322 (see Stubbs, C.H. ii 382, 383) when it was declared in the Parliament which repealed the ordinances of the Lords Ordainers that the business of the kingdom "shall be treated, accorded, and established in Parliament by our lord the king, and by the consent of the prelates, earls, and barons and commonalty of the realm according as has heretofore been accustomed."

[3] See Stubbs, C.H. ii 452, 607.

no better illustration of the result than the history of the Parliaments of 1376 and 1377.

During the minority of Richard II. Parliament and the nobility ruled the country. The selfishness and incompetence of their rule was evidenced by the varied grievances, political as well as social and agrarian, which were put forward by the rebels of 1381.[1] Richard was by no means an incapable king; but his attempt to put into practice his theory of absolutism disgusted the nation; and, as a result, his power in 1386 was entrusted to a committee of the great nobles. He managed to free himself from their control in 1388; and from 1388 to 1397 he ruled well. Many wise statutes were passed; and these years show that if the king would rule efficiently the country would gladly submit to be quietly governed.[2] It was a period which needed wise statutes and efficient rule. In political and social history, in the history of commerce, and in the history of religion, we can see the decay of old institutions and beliefs and ideas, and the beginnings of a new order of things. The rising of the villeins, the beginnings of the mercantile system, the teaching of the Lollards, testified to movements and changes which demanded statesmanship of the highest order. But again the king attempted to put into practice his absolutist ideas. The nation turned from him, and all classes welcomed Henry of Lancaster as a deliverer—the nobles as the representative of the families who had been oppressed by Richard II., the people at large as the saviour of the nation from the evils of despotism, the clergy as the defender of the church against Lollard heretics.[3]

The revolution of 1399 was unfortunately a reaction in favour of the old order at a time when what was needed was a gradual readjustment of institutions to meet a change in political, social, commercial, and religious ideas.[4] In Henry's wish to claim the crown by right of conquest we can see a personal and a selfish view;[5] and in his want of hereditary right we can see the germ of that dynastic dissension which was destined to destroy his

[1] Stubbs, C.H. ii 489-496. [2] Ibid 528, 529.

[3] For the tale that Henry IV. at first asserted that he had only come to claim his inheritance, and, as steward, to exercise his right to try and punish traitors, see Harcourt, The Steward and Trial by Peers 188.

[4] Trevelyan, Age of Wyclif 2, "The diseases that were destroying England in the reign of Richard II. were still eating at her heart in the reign of Richard III. The problems that beset her were but laid aside under the Lancastrians to be solved under the Tudors."

[5] "Proposuerat Henricus de Derby vendicare regnum per conquæstum, sed Gulielmus Thirning justitiarius Angliæ dissuasit," Leland, Coll. i 188, cited Stubbs, C.H. iii 10; Wylie, Henry IV. i 16; he disclaimed this intention in his speech to Parliament, R.P. iii 423 (1 Hy. IV. no. 56).

descendants. His reign was disturbed by faction.[1] The dynasty was new; and the wealth and power and turbulence of the nobility were growing with the tendency to the concentration of estates in a few hands.[2] But he honestly tried to govern and to work with his Parliaments; and he succeeded in restoring some kind of order, and in handing on the succession undisturbed to his son.[3] Henry V. diverted the energies of the nation to the impossible task of conquering France. All parties and classes were proud of his achievements and did their best to forward his aims.[4] It has been well said that he "galvanized mediævalism into life;"[5] but his descendants paid the penalty of thus prolonging the life of worn-out institutions. His premature death left the nation with an infant king and a war which was beyond the national strength to bring to a successful issue. When that king grew up he proved to be wholly incapable of governing, and, at intervals, quite insane. Under these circumstances the country grew more and more turbulent. The incapacity of the king, and the partisan policy pursued by the queen,[6] led the Duke of York to claim first the protectorship and then the throne. His son, Edward IV., succeeded in gaining the throne. He had both the power and the capacity to reform the government as the Tudors afterwards reformed it. Vicious and self-indulgent, he threw away his chances. He adopted no well-conceived plan for strengthening the executive. Many murders, robberies, and other evil deeds abounded.[7] His activity seemed to stop short with measures taken to enrich the crown, and with the disastrous step of promoting and using his wife's relatives as a curb upon the old nobility.[8] It was the jealousies caused by this policy which enabled Richard of Gloucester to murder his nephews and usurp the crown. The Yorkist kings had failed; and their failure was the opportunity of another dynasty.

[1] Stubbs, C.H. iii 289-292; Wylie, Henry IV. i 68, 69; Repyndon's letter to Henry IV., cited ibid i 200.

[2] Stubbs, C.H. iii 17—the result was "to lodge constitutional power in far fewer hands, to accumulate lands and dignities on men who were strong rather in personal qualifications and interests than in their coherence as an estate of the realm, to make deeper and broader the line between lords and commons, and to concentrate feuds and jealousies in a smaller circle, in which they would become more bitter and cruel than they had been before."

[3] Ibid 77.

[4] Ibid 77, 78.

[5] Trevelyan, Age of Wyclif 332.

[6] Stubbs, C.H. iii 206, 207; Gairdner, Paston Letters (ed. 1904) i 174, 175—it is said by a French chronicler, whom Mr. Gairdner believes, that the French attack on Sandwich in 1457 was invited by Margaret out of hatred to the Duke of York, in order to make a diversion while the Scots ravaged the north of England.

[7] In 1465 it is noted that "multitudo latronum in variis Anglie partibus debachans multas ecclesias et alios legios regis spoliavit;" in 1466 that "abundabant in Anglia furta homicidia et mala multa," Three Fifteenth Century Chronicles (C.S.) 181.

[8] Stubbs, C.H. iii 233; Plummer, Fortescue 37.

Thus it is that the symptoms of weakness which we see in the government in the fourteenth century were aggravated in the fifteenth century, and produced its total collapse. We may note, indeed, a progress and a development in social and commercial matters. Villeinage was decaying. Trade was becoming organized with a view to the maintenance of national power—a development which indicates a growing consciousness of national unity.[1] We begin in consequence to discern in the legal landscape familiar features. "Employer and employed, landlord and tenant, are seen with the relations between them reduced to something like the simple cash nexus of modern times."[2] The same phenomena have been noted in the intellectual life of the age. Dr. Rashdall says that "the scholasticism of the fourteenth century exhibits a decline," but, "out of the somewhat muddy metaphysics of the fourteenth-century schools there emerge present-day questions as to the foundations of property, the respective rights of king and pope, of king and subject, of priest and people."[3]

In fact, the history of this latest mediæval period is the history of a period in which old and new theories and ideals, honest attempts at reform, and personal and selfish aims mix and neutralize one another. We see in the speculations of Wyclif theories as to the relationship between king and church which are not far removed from those which Henry VIII. actually put into practice.[4] "In dealing with the king's relation to the national church, if Wyclif does not assign to him the position of its supreme head, the tendency of his arguments is all in this direction."[5] We see both in the theories of Wyclif[6] and in the debates in Parliament[7] views expressed as to ecclesiastical property which seem to anticipate another phase of the later Reformation settlement. We see in the work of Fortescue on the Governance of England remedies proposed for the

[1] Cunninghan, op. cit. i 377-378; below 471-473.

[2] Cunningham, op. cit. i 379. [3] Rashdall, Universities ii Pt. II. 529.

[4] Fasc. Ziz. (R.S.) 256, "Ecclesiasticus, immo Romanus pontifex, potest legitime a subjectis corripi et ad utilitatem ecclesiæ tam a clericis quam a láicis accusari;" ibid 258, "Cum ergo regnum Angliæ ad modum loquendi Scripturæ debet esse unum corpus et clerici domini atque communitas ejus membra;" De Dom. Civ. (W.S.) 270, "Item rex habet potestatem coactivam universalissimam regni sui."

[5] De Officio Regis (W.S.) xxvii; Figgis, Divine Right (1st ed.) 67-72; cp. Figgis, From Gerson to Grotius 121; as Figgis says, ibid 28, Dante's De Monarchia is, in so far as "he sets the temporal above the spiritual Lord," "a prophecy of the modern state, and of that doctrine of the Divine Right of kings, which formed for long its theoretical justification against clerical pretensions."

[6] Fasc. Ziz. (R.S.) 254, "Licet regibus in casibus limitatis a jure auferre temporalia a viris ecclesiasticis habitualiter abutentibus;" ibid 258, "Quod regnum nostrum potest legitime detinere thesaurum suum pro sua defensione in quocunque casu in quo necessitas hoc requirit."

[7] Wals. Hist. Anglic. (R.S.) ii 265 (1404); 282, 283 (1410).

prevailing anarchy which the Tudors employed.[1] We see in Richard II.'s theory of kingship a theory to which the Stuarts would have subscribed;[2] and we see that, in the fourteenth century as in the seventeenth, this theory was too hopelessly out of harmony with the ideas of his subjects, and with their settled forms of government, ever to succeed. We see foreshadowed in the works of Fortescue the rival theory; and, in the use which he makes of parliamentary history, we see the proofs which will one day be used to establish it.[3] But these things are all in the future. For the present Wyclif's theories are condemned as heresy; and the church, subjected to the rapacious court of Rome,[4] and growing ever more unpopular, more corrupt, and more secular as it too came under the influence of a lawless aristocracy, saved for a season her power and her revenues:—

> "In Christe's cause alday thei slepe
> Bot of the world is noght forgete . . .
> The strokes falle upon the smale,
> And upon othre that been grete
> Hem lacketh herte to bete."[5]

For the present no ruler is found strong and able enough to carry out Fortescue's suggested reforms. For the present these parliamentary precedents of the future are but historical facts.[6]

The "want of governance" was a blight which arrested all development. It rendered all attempts at serious reform impossible. For the equity of the chancellor and for the jurisdiction of the council there was crying need. But they were obnoxious to all classes of the nation—to the nobility, who did not wish to see their powers curtailed; to the common lawyers, in whom they aroused feelings of professional jealousy; to the nation at large, who, thinking that the rules of the common law were adequate if they were properly enforced, were not unnaturally averse to giving increased powers to a govern-

[1] Vol. i 484, 491-492.

[2] Stubbs, C.H. ii 675, "The series of events which form the crises of the Great Rebellion and the Revolution might link themselves on to the theory of Richard II. as readily as to that of James I.;" Figgis, Divine Right (1st ed.) 72-80.

[3] Below 441, 569-571.

[4] Above 306.

[5] Gower, Confessio Amantis (ed. Macaulay) Prologue; see Trevelyan, Age of Wyclif chaps. iv and v; Rogers, Gascoigne, Loci e libro veritatum; Plummer, Fortescue 25, 26.

[6] Stubbs has said (C.H. ii 665) of these parliamentary contests that it was "the substance of power, not the theoretical limitation of executive functions, that was the object of contention;" this is surely far more true than his oft-quoted description of the Lancastrian period (C.H. iii 288) as one in which "constitutional progress had outrun administrative order;" a seventeenth-century lawyer writing the history of these times might have used the latter phrase—but would a mediæval chronicler have understood it? Resolutions and decisions had been recorded which would one day serve the cause of constitutional progress. For the present they merely bore witness to the power of Parliament and illustrated, if they did not occasionally aggravate, the existing disorder.

ment which could not use aright the powers which it already possessed.[1] The House of Commons, indeed, petitioned and legislated against these abuses. It attempted to secure an honest administration by auditing the public accounts. It attempted by impeachment to bring corrupt ministers to justice. It passed well-conceived statutes (such as those relating to the justices of the peace) which improved the mechanism of government.[2] That mechanism was still intact. No fundamental changes were needed to enable it to be used with effect by a strong king, as the house of Tudor showed; and this was the fundamental difference between the English and the continental mechanism of government. But during this period it gradually ceased to do its appointed work for want of a ruler strong enough to enforce the law. In England, as in other countries in Western Europe, it was the age of "over-mighty subjects." The country was handed over to their rule; and they used their position in the council,[3] their influence over Parliament,[4] the offices which they held, the machinery of local government, all the forms of law, merely to further their interests and to aid them in the prosecution of their feuds.[5] In 1411 Sir Robert Tirwhit, a justice of the bench, confessed that he had arrayed a small army of five hundred men and set an ambush for Lord Roos, whom he had arranged to meet to compromise a dispute as to common of pasture; and he actually put forward in extenuation of his offence the wonderful plea that he, a royal judge, did not know that he had broken the law.[6] If these things were done by the lawyers, what could be expected from the laymen? In 1440 Mr. Justice Paston strongly advised a friend not to go to law with one who had the support of the Duke of Norfolk. "For if thou do, thou shalt have the worse, be thy cause never so true, for he is feid with (i.e. in the pay of) my lord of Norfolk, and much is he of his counsel; and also thou canst (get) no

[1] Political Songs (R.S.) ii 252—

"Many lawys and lytylle ryght;
Many actes of parlament,
And few kept wyth true entent."

[2] Vol. i 287-288; below 448-449. [3] Vol. i 484.

[4] Stubbs, C.H. iii 289, 444; Paston Letters i 163, 164, and nos. 288, 294, 295; the demand that the king's council shall be chosen in Parliament (Stubbs, C.H. iii 266) often meant that the choice of the king's ministers was taken from the king and vested in a body which the nobility could control.

[5] Plummer, Fortescue 21; for allusions to the need for "labouring jurors" and getting a "favourable panel," see Plumpton Corr. (C.S.) 131, 132, 141; see also Select Cases before the Council (S.S.) lxxv, lxxxiv-lxxxv.

[6] R.P. iii 649, nos. 12 and 13, "Coment par ignorance et non sciente il lui avoit governez in ceste matiere:" cp. ibid 200, no. 18—a complaint that the judges are too often found in the retinues of great lords.

man of law in Norfolk or Suffolk to be with thee against him; and therefore my counsel is, that thou make an end whatsoever thou pay, for he shall else undo thee and bring thee to nought."[1] In 1481 a petitioner alleged that the Duke of Suffolk, a justice of the peace and sometimes a commissioner of oyer and terminer, in person pulled her out of her chamber and put her out of her manor.[2]

"At Westminster halle
legis sunt valde scientes;
Nevertheless for hem alle,
ibi vincuntur jura potentes . . .
His owne cause many a man
nunc judicat et moderatur;
Law helpeth noght than,
ergo lex evacuatur."[3]

The strictness with which the courts interpreted the laws against maintenance was an expression of the censure of the common law.[4] But the censure was ineffectual. The forms of law and physical violence had come to be merely alternative instruments to be used as seemed most expedient.[5] This was the reason why a knowledge of the law was at this period so widely diffused.[6] It was as necessary for self-protection as a knowledge of the use of warlike weapons. The law was no longer a shield for the weak and oppressed—rather it was a sword for the unscrupulous. Men learned its rules as they learned the rules of sword play.[7] "The law servyth of nowght ellys in thes days," ran Cade's proclamation in 1450, "but for to do wrong, for nothyng is sped almost but false maters by coulour of the law for mede, drede, and favor."[8]

[1] Paston Letters i 42—the spelling is modernized; for another instance of what could be done by influence see Select Cases before the Council (S.S.) lxxxix.

[2] Poche v. Idle, Select Cases before the Council (S.S.) 117; the petitioner asked that another lord be ordered to restore her to the possession of her manor—as Professor Baldwin says, ibid xlvi, "The last stage of impotence seems to have been reached when the best hope of the complainant is that one great lord may be set against another in her defence."

[3] Political Songs (R.S.) i 272, 273 (1388); cp. ibid 358.

[4] Vol. i 334-335. The political songs of the time show that maintenance was regarded as the main root of the evil, Political Songs (R.S.) i 408; ii 235; cp. Vision of Piers Plowman (ed. Skeat) i 104; the fact that perjury was not at this period punishable as a crime (vol. iii 400) was no doubt one cause why maintenance, backed up by perjured evidence, was rampant, see Eyre of Kent (S.S.) i xxxiii.

[5] Paston Letters i 112-114.

[6] Ibid 118, 119, "The Paston Letters afford ample evidence that every man who had property to protect, if not every well-educated woman also, was perfectly well versed in the ordinary forms of legal processes;" Skeat notes that Langland had a good knowledge of legal procedure, Langland's Works ii xxxvi.

[7] This was the reason why leading statesmen like Cardinal Beaufort or the Duke of Somerset were careful to get at intervals comprehensive pardons from the king, Nicolas v 33, 254; and why men declined to be sheriffs without indemnity, ibid vi 263, 271, 272.

[8] Three Fifteenth Century Chronicles (C.S.) 96; on this subject see below 457-459; vol. iii 623-626 for further details.

The scheme of mediæval parliamentary government had hopelessly failed. The nation in Richard II.'s reign had turned to a Parliament led by the nobility for protection against despotism. Despotism had been averted—but at the cost of anarchy. The nation now turned to the king for protection. The common law looked to him to restore its old authority; and in this fact there is much significance. It was the common law which protected the public and private rights of Englishmen. Their political ideals were contained in its rules. User and time had given birth to a patriotic affection for its principles and a jealousy of all jurisdiction outside its sphere. Its attitude was therefore a fair index to the attitude of the majority of law-abiding Englishmen. With this national call to a new dynasty to assume authority a new epoch opens in the history of English law.

We may perhaps be tempted to compare this period with the age of Bracton, and the following period, in which the authority of the government was restored by the Tudors, with the age of Edward I. In both of the earlier periods the organization of government appeared to have broken down, and yet in both we see a distinct legal development. In both of the later periods the old mechanism of government, when improved and guided by abler men, was found sufficient to restore order and to keep the peace. There is an analogy between these periods—but no complete similarity. There are differences, in fact, between the old feudalism of the twelfth and thirteenth centuries and the new feudalism of the fourteenth and fifteenth centuries. The old feudalism directly attacked all centralized government. Society was organized upon a feudal model. As there was then no strong national feeling, it was the strength of the centralized institutions created by Henry II. which enabled them to stand the strain of the misrule of Henry III. The new feudalism, on the other hand, compassed its ends, not by direct attack, but by a perversion of the machinery of centralized government.[1] It was a bastard imitation of the old order of society founded upon the weakness of the crown and the selfishness and corruption of the ruling class. That ruling class did not represent the great body of the nation.[2] The nation, as a whole, was becoming more and more conscious of its national unity. In its aims and pursuits and

[1] Thus the great feud between Lord Bonevile and the Earl of Devon, which kept the West Country disturbed for many years, apparently arose from a dispute as to who was entitled to the office of steward of the duchy and county of Cornwall, Nicolas v 165.

[2] Political Songs (R.S.) ii 237 (date 1456)—"the commonys love not the grete."

ideals it was gradually outgrowing mediæval forms. It desired a government strong enough to keep the peace and capable of satisfying the new needs and aspirations of the modern state. The material power of the ruling classes in church and state enabled them for a time to hinder these aspirations by perverting the machinery which they pretended to direct; and this led to a far more highly organized form of disorder than was possible in the earlier period. But, on that very account, it was a form of disorder which did not destroy the machinery of government. It led, as the disorder of the earlier period had led, to many alterations and additions to the fabric of English law; but neither after the earlier nor after the later period was there any break in the continuous development of that law. To the history of that development we must now turn.

I shall divide the subject under two main heads: Firstly, Parliament and the Statutes; and secondly, The Legal Profession and the Law. These two heads will correspond roughly with what may be called the external and the internal sources of law during this period. Though the various sources of the law cannot in all cases be quite clearly separated on these lines, this division affords a convenient basis for historical treatment.

I. Parliament and the Statutes

As a preface to my discussion of this subject I shall say something of the Parliamentary Records. As with the Curia Regis, so with Parliament, the history of these records teaches us much about the body the doings of which they chronicle. In the second place, I shall say something of the development of the English Parliament during this period. We shall see that this development was quite peculiar to England, and that it has had a large effect upon the whole future course of English constitutional history. Thirdly, I shall discuss in some more detail the most striking of the immediate consequences of the development of Parliament—the growth of its legislative authority. Fourthly, I shall attempt to summarize the effects of this development of Parliament, and this growth of its legislative authority, upon the future history of the English constitution and English law. Lastly, I shall attempt an analysis of the main lines of legal development as illustrated by the statute law of the period. This analysis will serve as an introduction to the history of the more exclusively legal sources of the law, and to the history of the development of legal doctrine.

The Parliamentary Records

These records fall into three divisions; (1) The Petitions; (2) the Parliament Rolls and Writs; (3) the Statute Rolls and the Statutes.

(1) The Petitions.

We have seen that one of the most important duties of the king's council in Parliament in the thirteenth century was the hearing of petitions from all and sundry;[1] and that many regulations were made for dealing with them.[2] They were the raw material—the originals—from which much of the record of the Parliament will be made up,[3] which will give the king and his council much information as to the state of the nation,[4] which may suggest new legislation.[5] Maitland thus describes the form of these petitions:[6] the petition "will in general be a strip of parchment about five inches long, while its breadth will vary from three inches to a bare inch. On the front of this strip and along its length the petitioner's grievance and prayer will be written, usually in French, rarely in Latin, and will be addressed: 'To our Lord the King,' or 'To our Lord the King and his Council.' On the back of this strip and across its breadth there will almost always be written some words, usually in Latin, rarely at this time in French, which either prescribe the relief which the petitioner is to have or send him away empty. Then below this endorsement there will very often occur the syllable *Irr*^{r}, while just now and again we find the full *Irrotulatur*. Then, if we are lucky enough to connect the document with an entry on the Parliament Roll, the relation between the two will be of this kind: By means of the formula, *Ad petitionem A de B petentis quod, etc., Ita responsum est quod, etc.*, the roll will first state the substance of the petition, having turned its plaintive French into business-like Latin and pruned away its immaterial details, and then it will give with absolute accuracy the words of that response which is endorsed on the petition." That response will, as we have seen, often send the petitioner to the ordinary courts for the writ which will give the required relief.[7]

In the course of the fourteenth century there is a change in the character of the petitions which are entered upon the Parliament Rolls. They are petitions rather of estates or communities

[1] Vol. i 354-355.
[2] Ibid.
[3] The greater part of the Parliament Roll of 1305 is concerned with petitions; in the R.S. edition they take up 263 out of the 320 pages of the text.
[4] Maitland, Parliament Roll (R.S.) lxxv.
[5] Ibid l-liii.
[6] Ibid lv.
[7] Vol. i 355.

than of private persons.[1] Many petitions were still presented by private persons, but the author of the "Modus tenendi Parliamentum" gives them the last place.[2] They were received by the council or the auditors of petitions,[3] but were not brought before Parliament; and so they were not entered upon the rolls, but collected in bundles.[4] About sixteen thousand of these documents of the thirteenth, fourteenth, and fifteenth centuries still survive. They have no dates, and they are not arranged in chronological order. But if they could be collated with the Parliament Rolls and the records of the writs which gave effect to their prayers, they might be made to elucidate many problems of legal and constitutional history.[5] Good use has been made of them by Professor Baldwin in his volume of Select Cases before the Council.[6]

These sixteen thousand documents, which have existed for so many centuries in their old bundles, are characteristic of this early period in the history of Parliament. Parliament has begun to separate itself from the council. But the sphere of the council's activity is not yet fixed. Its relation to Parliament and the courts—especially to the King's Bench and the Exchequer—is close.[7] As yet there is no clear line between the things that can be done by the administrative powers of the council, and the things for which a private Act of Parliament[8] is needed. When such matters as these become settled these miscellaneous bundles of petitions cease to accumulate.

(2) The Parliament Rolls and Writs.

We have seen that the courts of common law had their separate rolls, and that the possession of a separate roll is perhaps the clearest test of the attainment of a separate and

[1] Maitland, Parliament Roll (R.S.) lxvi.

[2] Stubbs, Sel. Ch. 507—the following is the order of business, "Primo de guerra si guerra sit . . . secundo de negotiis communibus regni ut de legibus statuendis . . . tertio debent rememorari negotia singularia, et hoc secundum ordinem filatarum petitionum;" for this tract see below 424-425.

[3] For the auditors of petitions see vol. i 359.

[4] Hale, Jurisdiction of the House of Lords 64-65; Maitland, Parliament Roll (R.S.) lxiv, lxv.

[5] Ibid xxvi, xxvii, xxxiii, xxxiv.

[6] Introd. xiii.

[7] Vol. i 209-210, 233-234.

[8] The distinction between public and private Acts was becoming clear in Henry VI.'s reign, Fitz., Ab. *Parliament* pl. 1 = Y.B. 33 Hy. VI. Pasch. pl. 8. As this case shows, the private Acts were not enrolled; they were merely filed in bundles, Cooper, Public Records i 171, 172 n.; after 31 Henry VIII. (1540) the difference is specifically stated upon the enrolment in Chancery, ibid 162; their connection with the petitions may be seen from the manner in which they are described on the enrolments of Acts 16 Car. I. to 31 Geo. II.—"quædam petitiones privatas personas concernentes in se formam Actus continentes exhibitæ fuerunt prædicto Domino Regi in Parliamento prædicto quarum tituli subscribuntur, viz. Private Acts," Statutes (R.C.) i App. E.

independent existence.[1] As we might expect, we get our earliest Parliament Rolls in Edward I.'s reign. The earliest actual roll which we possess is that of 1305. It has been edited by Maitland for the Rolls Series. As we shall see, we know that earlier rolls exist, and possess some extracts from them.[2] Of the later rolls we cannot be sure that all exist. It has been suggested that some of the rolls may have been destroyed by kings who found there precedents unfavourable to absolutist claims. Maitland does not consider this theory very probable, though some colour is given to the theory by the printed roll. He suggests that at first a Parliament Roll was "a somewhat superfluous document."[3] Original petitions could be found among the Chancery records. These or other records would contain an account of the writs issued or other proceedings taken upon them. The records of suits decided in Parliament would often be found upon the Coram Rege rolls. There was a separate roll, as we shall see, for the statutes. However this may be, in the course of the fourteenth century the Parliament Rolls become the record of the proceedings of Parliament; and the mass of private petitions appearing upon them tends, as I have said, to diminish in quantity. The change, Professor Tout thinks, was due to the initiative of a Chancery clerk of name William St. Airmyn, whose roll of the Parliament of Lincoln in 1316 "is the first Parliamentary Roll which gives us, in the form of short dated minutes, a record of parliamentary proceedings day by day."[4] It set an example to future clerks entrusted with the compilation of these rolls. And so these rolls come to "contain entries of the several transactions in Parliament; when complete they include the adjournments and all other common and daily occurrences and proceedings from the opening to the close of each Parliament, with the several petitions or bills, and the answers given thereto, not only on public matters, on which the statute was afterwards framed, but also on private concerns. In some few instances the statute, as drawn up in form, is entered on the Parliament Roll; but in general the petition and answer only are found entered; and in such case the entry, of itself, furnishes no certain evidence that the petition and answer were at any time put into the form of a statute."[5] These rolls ceased

[1] Vol. i 196, 206. [2] Below 422-423.

[3] Maitland, Parliament Roll (R.S.) lxv, lxvi.

[4] Tout, Edward II. 184-185.

[5] Cooper, Public Records i 175, 176. They are described in the Modus tenendi Parliamentum (Stubbs, Sel. Ch. 505, 506); there are "duo clerici principales parliamenti . . . qui irrotulabunt omnia placita et negotia parliamenti;" they are not subject to the judges, but only "regi et parliamento suo;" they enrol all the pleas heard in Parliament. All their rolls must be sent in to the Treasury before the end of the Parliament. There are five other clerks, who are assigned to the bishops, the

in 1503. Their place was taken by the Journals of the House of Lords and the House of Commons. The Journals of the House of Lords begin in 1509. They contain serious gaps,[1] some of which can be filled from other sources,[2] and there is some evidence that there were earlier Journals which are now lost.[3] Probably they developed gradually from the rolls.[4] The Journals of the House of Commons begin in 1547. They are probably a new departure, and they do not become a full record of the proceedings of the House till the beginning of Elizabeth's reign.[5]

It is to the Parliament Rolls that we must look for an authentic account of the proceedings of the mediæval Parliaments. It is to the parliamentary writs that we must look for authentic information as to their constitution. Precedents drawn from these rolls and writs were the principal source for the learning concerning the "lex et consuetudo Parliamenti." They were not supplemented, as the records of the courts of common law were supplemented, by Year Books and reported cases. Hence they never fell into the same oblivion as the records of these courts. In the seventeenth century it was to them that the leaders of the parliamentary party looked for the proofs of their views as to the great constitutional questions then at issue. It was not till after the controversy between the king and Parliament was settled that they ceased to be of the first importance to the constitutional lawyer. Thus it happens that from the fourteenth century downwards these rolls and writs have attracted much attention.

In the fourteenth century some one made a selection from the Parliament Rolls of the first two Edwards. This selection has been called by various titles. Its best-known title is that by which it was known in the seventeenth century—the *Vetus Codex*.[6] It contains extracts from the rolls of the years 18-23 of Edward I.'s reign and from the fourteenth year of Edward II.'s reign. Probably in the form in which it has come down to us it is not quite complete. Maitland thinks that it may

procurators of the clergy, the barons, the knights, and the burgesses respectively. They record the doings of these various estates, "et cum ipsi vacaverint juvabunt clericos principales ad irrotulandum."

[1] Pollard, Royal Hist. Soc. Tr. (Third Series) viii 20.

[2] Ibid 20-22; cp. E.H.R. xxviii 531 seqq., which fills up the gaps in these Journals in 1509 by means of the Petyt MSS.

[3] Pollard, op. cit. 27-28.

[4] Ibid 28.

[5] Cooper, op. cit. i 177 n. 25; Pollard, op. cit. 27, says, "a study of the development of the Commons Journals between 1547 and 1603 suggests that the meagre entries which begin with Edward VI.'s reign, and with the removal of the Commons' House to St. Stephen's were the real beginning of their Journals."

[6] For a description see Maitland, Parliament Roll (R.S.) ix-xii, 343-349; Cooper, Public Records ii 11-13; reference is made to it as an authoritative book in an exemplification by letters patent tested 12 December, 6 Rich. II., ibid 12, 13.

have been an official book compiled almost contemporaneously with the rolls from which it contains extracts. He compares it with the *Olim*—a selection from the rolls of the Parliament of Paris compiled about 1263 by Jean de Montlucon, the "greffier."[1] In 1661 Ryley printed it, together with an appendix of extracts from the Patent and Close Rolls of Edward I. and II., and some selections from the petitions addressed to Parliament between the reigns of Edward I. and Henry VI. He called the work *Placita Parliamentaria.* In the seventeenth century the importance of the Parliament Rolls was so great that transcripts were made for private use, and published by private enterprise. In 1657 Prynne published Cotton's abridgment of the rolls under the title of *Cotton's Records;* and in 1659 he published some account of the parliamentary writs. In 1685 a collection of these writs was published by Dugdale. Hale had transcripts made for him, and his books show that he had studied them minutely.[2]

In 1765, in consequence of an order of the House of Lords, an official edition of the Rolls of Parliament was taken in hand. The editors took their text from Ryley; from Hale's transcripts; from "copies purchased by Mr. Tonson, corrected from originals in the Tower;" from "copies purchased from Mr. Webb, corrected with the originals in the Rolls Chapel;" from "parliamentary matter found on the Patent and other rolls, and also in public offices and private collections." The work so published has done good service to the study of constitutional law and legal history. But it hardly comes up to the requirements of the present standard of historical accuracy. There are many things omitted which could be supplied from the greater knowledge which we now possess of our national records. The edition itself is neither a facsimile nor a modern extended text.[3] The imperfections of this edition led the first Record Commission to listen to the proposals of Sir F. Palgrave to prepare a new edition of the Rolls of Parliament. As a first instalment of this great work there were published between 1827 and 1834 two large folio volumes dealing with the parliamentary writs and writs of military summons of the reigns of the first two Edwards, together with elaborate appendices, indices, and digests.[4] Unfortunately the work never reached a further

[1] Y.B. 1, 2 Ed. II. (S.S.) xi. This Vetus Codex is now in the Record Office; it bears on its first leaf the names of those in whose official custody it has been, Parliament Roll (R.S.) x-xii.

[2] Cooper, Public Records ii 1, 2, 27, 28. [3] Ibid 2, 28, 29.

[4] The published work consists of (1) writs of summons addressed to the prelates, earls, and others (officials or otherwise) individually, (2) proxies of the prelates, earls, and proceres, (3) precepts issued by the archbishops and bishops pursuant to the

stage. Its plan aroused criticism. The fact that some of the documents there printed had already been printed in the Lords' Report on the Dignity of a Peer and in the Record Commission's edition of Rymer's Fœdera; the fact that the collection began with the reign of Edward I. and not with the earliest period of our history; the length of the digests and indices—were all made matters of complaint by those who disapproved of the proceedings of the Record Commission.[1] The commission went under, and no more records were published at the national expense.

The Parliament Roll of 1305, published by Maitland in the Rolls Series, shows us the kind of thing that Palgrave wished to do for all the Parliament Rolls. It shows us how the rolls might be published so as to exhibit the relation of the entry on the roll to the preliminary petition and the subsequent proceedings. No doubt if this is ever done for all the rolls the edition will be the better for the delay—the editor will have before him such publications as the calendars of the Charter, Patent, and Close Rolls; and, says Maitland, "I am persuaded that if the Charter, Patent and Close Rolls, the privy seals, the memoranda of the Exchequer, and the Coram Rege Rolls were used skilfully and in combination, our historian would be able to give us an account of many a session or parliament of the council of which we have not yet heard, to tell us who were present and what business was transacted."[2]

Just as in earlier days the Dialogus de Scaccario and Glanvil's treatise illustrate the growing importance of the Curia Regis, so, in the fourteenth century, the growing importance of Parliament is illustrated by the tract called the *Modus tenendi Parliamentum.* There are many MSS. of it extant, one of which is in French.[3] There are three printed editions of the original text,[4] and several English translations.[5] It naturally

præmunientes clause, (4) writs for the election of members of the House of Commons and returns, (5) writs for levying the expenses of members of the House of Commons, (6) writs of military summons addressed to individuals, (7) similar writs addressed to the sheriff, (8) commissions of array, (9) records showing the names of persons who attended at Parliaments or councils, (10) records showing actual performance of military service.

[1] Cooper, Public Records ii 48-73; Maitland, Parliament Roll (R.S.) xxviii, xxix.

[2] Parliament Roll (R.S.) lxxxix.

[3] For these see E.H.R. xxxiv 209; Bemont, La date de la composition du *Modus tenendi Parliamentum*, Melanges Julien Havet; a fifteenth century English version is printed E.H.R. xxxiv 216. On the tract as a whole see Ewald, Paper and Parchment 59-70.

[4] D'Archery, Spicilegium xii 557; T. D. Hardy; Stubbs (Sel. Ch.) a reprint of Hardy's edition.

[5] J. Hooker (1571); Hakewell (1659); Hardy (1846). For an old French version of 1406-1412, see Hardy, Archæological Journal xix 259.

attracted much attention in the seventeenth century. Coke[1] swallowed whole its opening paragraph,[2] and boldly stated that it was composed before the Norman Conquest, though Selden had stated that it clearly must have been written long after the Conquest.[3] Prynne went to the other extreme and stated that it came from the reign of Henry VI. or Henry VIII.[4] Probably it comes from the reign either of Edward II. or Edward III. Hardy, who is followed by Stubbs, places its date at some period between 1294 and 1327.[5] Bemont considers that the MSS. and the internal evidence of the treatise point to the latter end of the fourteenth century; but he admits that in one of the MSS. in which it is contained there is nothing to be found inconsistent with the date 1327.[6] The prominence given to the arrangements for the receipt and trial of petitions, and the fact that they are still apparently entered on the rolls;[7] and the prominence given to the barons in the section "de casibus et difficilibus judiciis,[8] incline me to favour Stubbs's view. Whether we ascribe it to the later or the earlier date the tract shows us that the constitution and the powers of Parliament are becoming fixed. It is a court superior to all other courts, possessing its own set of rolls and its own officials;[9] and in the view of the writer the representative portion of the Parliament is the most important.[10] It was considered a decisive authority upon the procedure of Parliament at the beginning of the sixteenth century; and for this reason it may be considered as the ancestor of the modern books upon Parliamentary Practice.[11]

[1] Co. Litt. 110.

[2] "Hic describitur modus, quomodo parliamentum regis Angliæ et Anglicorum suorum tenebatur tempore regis Edwardi filii regis Ethelredi."

[3] Titles of Honour, Works iii 648.

[4] Register of Parliamentary Writs Pt. 4 § 8; cp. Hardy's notes xxi-xxiii.

[5] See Ewald, Paper and Parchment 59-61, for a summary of Hardy's argument; cp. Bemont, loc. cit. 478, 479.

[6] Ibid 472, 478, 479. The MS. referred to is Vespasian B vii.

[7] Modus tenendi Parliamentum (Stubbs, Sel. Ch.) 507; 509, "Primo die debet fieri proclamatio . . . quod omnes illi qui petitiones et querelas liberare velint ad parliamentum, illas liberent a primo die parliamenti in quinque dies proximo sequentes;" ibid 513, at the close of the Parliament a proclamation is made that those whose petitions have not been answered may come forward; ibid, "Clerici parliamenti non negabunt cuiquam transcriptum processus sui, sed liberabunt illud cuilibet qui hoc petierit, et capiunt semper pro decem lineis unum denarium."

[8] Harcourt, Steward, 147.

[9] Sel. Ch. 505, 511.

[10] Ibid 512, "Et ideo oportet quod omnia quæ affirmari vel infirmari, concedi vel negari, vel fieri debent per parliamentum, per communitatem parliamenti concedi debent, quæ est ex tribus gradibus sive generibus parliamenti, scilicet ex procuratoribus cleri, militibus comitatuum, civibus et burgensibus, qui repræsentant totam communitatem Angliæ, et non de magnatibus, quia quilibet eorum est pro sua propria persona ad parliamentum et pro nulla alia."

[11] Pollard, Royal Hist. Soc. Tr. (third Series) viii 36-37; Professor Pollard points out that John Taylor, clerk of the Parliament in 1510, had the Modus transcribed for his guidance and prefixed it to the Journals of the House of Lords.

(3) The Statute Rolls and the Statutes.

We have seen that documents which we meet upon the earlier pages of the Statute Book are a very miscellaneous collection.[1] In this period the increasing share taken by Parliament in the work of legislation is gradually drawing a line between legislative and administrative enactments. But, as we shall see, the part played by the different parts of the legislature in the enactment of statutes is not yet fixed ;[2] nor are the boundaries of the legislative and the executive authorities defined. For this reason there is still considerable obscurity as to the exact number of documents which can be dignified by the name of statute.

About some documents there can be no question. These are the documents entered upon the Statute Rolls.[3] The earliest of these rolls now extant (called the Great Roll of the Statutes) begins with the Statute of Gloucester, 1278. From 1278 to 1468, with an interruption from 1431 to 1445, there are six of these rolls in a regular series.[4] There is some reason for supposing that similar rolls once existed as late as 1489.[5] There is no evidence that any rolls of a later date ever existed. The place of the Statute Rolls was taken by (i) Enrolments of Acts of Parliament certified and delivered into Chancery—a continuous series from 1483 till the present day ;[6] or (ii) by the original Acts, i.e. the bills "as engrossed after being brought into Parliament, and in the state in which, after such ingrossment, they passed both Houses and received the royal assent."[7] These exist in an almost regular series from 1497 to the present day.

It is with regard to the mediæval period that the greatest uncertainty has existed as to the contents of the Statute Book.

[1] Above 222-223. [2] Below 436-438.

[3] Cooper, Public Records i 166-168.

[4] The Great Roll, 6 Ed. I. to 50 Ed. III.; the second roll, Rich. II.—with a separate roll of one membrane containing a duplicate of the Statutes 21 Rich. II.; the third roll, Hy. IV. and V.; the fourth roll, 1-8 Hy. VI.; the fifth roll, 25-39 Hy. VI.; the sixth roll, 1-8 Ed. IV.

[5] "The statutes after 8 Edward IV. until 4 Henry VII. inclusive are inserted in the early printed editions in a form manifestly copied from complete Statute Rolls," Cooper, Public Records i 168.

[6] Ibid 168-170; Statutes (R.C.) i App. E., App. F. lxxv-lxxviii. In Richard III. and Henry VII.'s reigns they include other proceedings of Parliament besides Acts. They are very like the Parliament Rolls; but this miscellaneous matter gradually drops out. Up to 25 Hy. VIII. they contain all Acts, public and private, but in 31 Hy. VIII. a simpler form of enrolment is used. 25 Hy. VIII. to 35 Eliza. some of the private Acts are omitted. After that date the private Acts are not enrolled. In the sessions of 1 and 3 Car. I. a reversion was made to the older form of making up the Roll, but only the titles of the private Acts are inserted. From 16 Car I. to 31 Geo. II. the simpler form of enrolment is again used, and the rolls contain only the public Acts and the titles of the private Acts. After that date even the titles are omitted.

[7] Cooper, op. cit. 174, 175. They are described in Statutes (R.C.) i App. F.

The Statute Rolls themselves are neither accurate nor perfect.[1] Many documents not upon the Statute Roll have been recognized as possessing statutory validity. "Acts of Parliament," says Coke, "are many times in form of charters or letters patent;"[2] and the dicta in *The Prince's Case*[3] seem to go almost the length of deciding that any instrument to which the king, lords, and commons appear to have assented is a statute. But it is clear from Coke's writings that there are many entries upon the Parliament Rolls which comply with this test, and yet have never been comprised in any collection of the statutes;[4] and, as we shall see, the Record Commissioners found that if they included all such documents they would have overweighted their collection with an unmanageable mass of material.[5] Matters were not mended when, at the close of the mediæval period, the printed editions of the statutes began to appear.[6] The editors and publishers of various complete editions of the statutes included in their collections many documents taken from the Rolls of Parliament and other sources. None of these editions was officially authentic. In fact, English law knew neither an officially authentic collection of the statutes, nor, as we shall see, an officially authentic series of reports.[7] Lawyers were dependent for their knowledge of the contents of the Statute Book upon judicial dicta, books of authority and the work of private persons such as Pulton, Cay, Hawkins, and Ruffhead. In the absence of official publications, the learning of the bar and the enterprise of the law publisher employed upon the Statute Book and the reports, have exercised a very real censorship upon the sources of English law.

The inconvenience of such a state of things was so obvious that proposals were made at different periods for the compilation of an officially authentic edition of the statutes.[8] Edward VI.

[1] Cooper, Public Records i 155 n. 1, citing as an instance c. 5 of Stat. West. II.; Statutes (R.C.) i 77 nn. 6-8; 85 n. 5.

[2] Second Institute 525; The Prince's Case (1605) 8 Co. Rep. 19 citing many instances, e.g. Magna Carta, statute of Leap Year, Articuli Cleri; "and it was resolved that these words in an Act or Charter (by authority of Parliament) are sufficient to make it an Act of Parliament."

[3] (1605) 8 Co. Rep. 19, 20, 20b—even though the statute be endited *Quod Dominus Rex statuit*, yet, if it is entered on the Parliament Roll, and always allowed as an Act of Parliament, it shall be intended that it was by authority of Parliament.

[4] Fourth Institute 50; cp. Report of the Committee on Public Records, 1800, cited Cooper, Public Records i 157, to the same effect; as Nicolas, Privy Council iii VII., VIII. points out, the recital of the consent of Parliament was in many cases "not intended to, and did not imply such an assent as to impart to the proceeding the form and character either of a statute of the realm or of an Act or Ordinance of Parliament."

[5] Cooper, Public Records i 157-159.

[6] For a list of these editions see Statutes (R.C.) i App. A; and see Bk. iv Pt. I. c. 2.

[7] Below 532-536.

[8] For these projects see Cooper, Public Records i 139-144.

in 1551, though only a boy of fourteen, criticized the state of the statute law.[1] In the reign of Elizabeth the Lord Keeper, Sir N. Bacon, proposed a scheme for such an edition. His more eminent son proposed a similar scheme for revising the statute law. The same project was recommended by James I.; and some steps were taken to carry it out.[2] Under the Commonwealth[3] and after the Restoration[4] similar proposals came to nothing. Thus it happened that at the beginning of the nineteenth century the Record Commissioners found great difficulties in deciding upon the title of many documents to possess legislative authority. In compiling their edition they had recourse to the Statute Rolls, to the Inrolments of Acts, to Exemplifications and Transcripts by Writ, to the original Acts, to the Parliament Rolls, to the Close, Patent, Fine, and Charter rolls, to books of record, and to various books and MSS. not of record.[5] From these sources they took all such documents as appeared to be entitled to the status of statutes; and in addition they inserted all such instruments as had been inserted in previous editions of the statutes—thus giving weight to the "general received tradition" which, as Hale says, may be accepted in the absence of better evidence.[6] Their work goes as far as the last year of the reign of Anne.

The Commissioners disclaimed any adjudication upon the question of the authority possessed by any instrument inserted in their collection.[7] It is clear, however, in spite of this disclaimer, that the fact that an instrument finds a place in their official collection raises some presumption in its favour. At any rate, their work has formed a basis for the proceedings of the Statute Law Committee and the passage of the Statute Law

[1] Burnet, History of Reformation ii 272, cited Ilbert, Legislative Methods and Forms 43.

[2] In 1610 a digest and repeal of the Penal Laws was stipulated for by the House of Commons as part of the Great Contract, and Bacon, Hobart, Finch, and Noy made some progress with the work, Cooper loc. cit. 141, 142; for Bacon's proposals for this and other similar reforms in the literature of the law, see Bk. iv Pt. I. c. 5.

[3] In 1650 a committee was appointed to revise and codify all former statutes. They did not report. In 1651-1652 Hale, Ashley Cooper, Rushworth, and others reported in favour of revision. The work was afterwards abandoned. There was another committee in 1653 of which no proceedings are discoverable.

[4] In 1666 Finch, Maynard, Atkins, Prynne, and others were put on a committee for this purpose. Nothing came of this measure. It was the last attempt before the Record Commission.

[5] Cooper, Public Records i 155-184 and the appendices to the first vol. of this edition.

[6] History of the Common Law 19, "Though the Record itself be not extant yet general statutes made within time of memory, since 1 *Richardi primi*, do not lose their strength, if any authentical memorials thereof are in books, and seconded with a general received tradition attesting and approving the same."

[7] "It is to be particularly observed that any decision upon the degree of authority to which any new instrument may be entitled, as being a statute or not, is entirely disclaimed," Statutes (R.C.) i Introd.

Revision Acts, which are still doing much to clear up the obscurity which has hung so long about the earlier pages of the Statute Book.[1] This obscurity is, as we shall see in the two following sections, accounted for by the gradual development of Parliament, and the gradual growth of its legislative authority.

The Development of the English Parliament

During the fourteenth century Parliament was gradually becoming something very much more than an assembly at which the king and his council met the estates of the realm to talk with them of the state of the nation.[2] It was becoming an essential organ of the English Government, separate from and often antagonistic to the king and his council. By the middle of the fifteenth century its right to control taxation was undisputed; and the change in procedure from legislation by way of petition to legislation by way of bill [3] emphasized the fact that it had become a partner with the king in the work of legislation. Moreover, the fact that, by this date, each of the two Houses had acquired a distinct corporate character is shown by their possession of numerous privileges, which had been successfully asserted during these centuries, and had been recognized by the courts in wide and ample terms.[4] It is thus clear that the "High Court of Parliament" had attained a very important place among those many courts by which the mediæval English state was governed, and attributes which sharply differentiated it from any other court.

At the close of the mediæval period these differences also sharply differentiated the English Parliament from the representative assemblies of the continent.[5] There were many reasons for this difference in development, some of which have often been noted by historians. The fact that the representatives of the counties and the towns united in one House of Commons added to the weight of the representative House. That this alliance was possible was an indirect result of the commonness of the common law. The crown had large powers to direct the various sections of which the Parliament was composed to deliberate together, because "there were no fixed gulfs between the different

[1] See the various revised editions of the Statutes with Indices and Chronological Tables. The first of these Acts was passed in 1856. The committee was appointed in 1868, Ilbert, Legislative Methods and Forms 24-26, 57; and see generally ibid chap. iv for details as to measures taken after the period of the Record Commission.

[2] Vol. i 352-353; above 302.

[3] Below 438-440.

[4] Below 433, 445 n. 6, 561.

[5] See Bk. iv Pt. I. c. 1 for these continental assemblies.

grades which the royal authority could not bridge."[1] There was nothing in England resembling the *noblesse* of the continent; and this again, in an age when property and office and dignity were closely interwoven, was connected with the strict rule of primogeniture which, from an early period,[2] had been the rule laid down by the common law first for the military tenures and then for all the free tenures. The fact that England was free from invasion during a period which was on the whole a period of commercial growth and prosperity, coupled with the fact that the English kings desired to pursue an aggressive and therefore an expensive foreign policy, rendered possible a process of bargaining which necessarily resulted in acquisition and consolidation of the powers of Parliament. I do not overlook the importance of these facts; but I wish to emphasize especially here another, and a more especially legal set of facts, the importance of which was great in the Middle Ages, and even greater in the sixteenth century.

At no period in English history do we see any antagonism between the common lawyers and the Parliament. On the contrary, the lawyers recognize it not only as a court, but as "the highest court which the king has,"[3] in which relief could be given which could be given nowhere else,[4] in which powers could be exercised which neither the king nor any other body in the state could exercise,[5] in which the errors of their own courts could be redressed.[6] From an early period lawyers have been distinguished members of the House of Commons;[7] and the judges and the law officers were from the earliest period members of the Council, which was at first the "core and essence" of the Parliament. Even when the judges and law officers ceased to be members of the House of Lords, they continued to be summoned, and are still summoned, to that House by writs of attendance.[8] This is a fact of the greatest importance in the history of the English

[1] Pollard, Evolution of Parliament 77; see above 303-304.

[2] Vol. iii 172-173.

[3] Y.B. 19 Hy. VI. Pasch. pl. 1 p. 63, "Le Parlement est la court du Roy, et le plus haut court que il ad;" below 433-434.

[4] Brooke, Ab. *Parlement* pl. 33, "Ou matter est econter reason, et le partie nad remedy al comon ley il suera pur remedy in parliament."

[5] 49 Ass. pl. 8, "Le Roy ne purra my grant cel per sa chartre sans Parliament, ne faire tenements devisable per sa chartre ou ils ne furent pas devisable devant."

[6] Vol. i 360-361.

[7] Porritt, The Unreformed House of Commons 512, 513; but they were sometimes unpopular; in 1330 there was an ineffectual attempt to exclude them from the county representation; and in 46 Edward III. an ordinance or statute was passed excluding them, see as to the position of this document the Record Comm. Ed. of the Statutes i 394 n.; the attempt to exclude them failed, for, as Mr. Porritt says, "testimony to the presence of lawyers in the House is abundant as soon as the entries in the Journals begin to be full and detailed."

[8] Redlich, Procedure of the House of Commons ii 53.

Parliament because it meant that the best legal talent of the day was ready to assist in the development of its powers. It meant that men who were accustomed to the working of the procedural rules of the royal courts were ready to assist it to devise a rational system of procedure. No doubt the procedural rules of the common law were gravely defective;[1] but they had at least one merit—they discountenanced the very archaic legal ideas which so seriously hampered the representative assemblies of the continent. They were capable of a certain amount of development and adaptation;[2] and the men who spent their lives in working and developing them were the men who were best fitted to create a workable set of rules for the guidance of a representative assembly. We must not minimize the importance of this question of procedure; for, just as the procedural rules of the common law were the foundation upon which that law was built, so the acquisition by the English Parliament of a reasonable set of procedural rules is the secret of its capacity to develop into an organ of the government of the state.

We know, it is true, but little of the procedure of the mediæval Parliaments. But Parliamentary procedure, as we see it in the Elizabethan Parliaments, was clearly an old growth; and we do know enough of the procedure of the mediæval Parliaments to see that many of the Elizabethan rules are older than the sixteenth century.[3] A few of these rules will show us what a large debt the English Parliament owed in its earliest years to its close alliance with the law and the lawyers, and more especially to the common law and the common lawyers.

(1) From the earliest period in its history the English Parliament has accepted the principle that the wishes of the majority are decisive.[4] It is probable that the principle itself was derived from the canon law. In this, as in many other instances, ideas drawn from the canon law had a large influence upon the minds of those who were creating a common law in the thirteenth century.[5] It is clear from the Year Books that in the fifteenth century it is accepted as an ordinary and obvious principle.[6]

[1] Vol. iii 623-626. [2] Below 434.

[3] See e.g. Y.B. 33 Hy. VI. Pasch. pl. 8, for an account of the procedure used in making a statute.

[4] Redlich, op. cit. ii 261-264; it may perhaps be noted that there is earlier authority for the principle than the Articuli Baronum of 1215—the earliest authority cited by Redlich; in the Leges Henrici Primi 5. 6, it is stated that in case of conflict the views of the majority will prevail—"Quodsi in judicio inter partes oriatur dissensio, de quibus certamen emerserit, vincat sententia plurimorum;" it was not till 1367 that it was settled that the verdict of a jury might not be given by a majority, vol. i 318; Thayer, Evidence 87 n. 4.

[5] Above 227-229. For the reasons for and results of its non-acceptance abroad see Bk. iv Pt. I. c. 1.

[6] Y.BB. 19 Hy. VI. Pasch. pl. 1 p. 63; 15 Ed. IV. Mich. pl. 2 p. 2, "Sir, en le Parliament si le greindre partie des Chivaliers des Countys assentent al feasans d'un

(2) We shall see that the procedure by bill applied to legislation and taxation had much to do with the consolidation of the power of Parliament.[1] It is well to remember that a procedure by bill, setting out the relief sought, was the ordinary procedure of those who asked some favour or some relief from the Council or the Chancery;[2] and a suit to Parliament for a private Act, doubtless by bill, was the proper remedy when no relief could be had either at common law or in the Chancery.[3] (3) The committee system, which we see in full working order in the Elizabethan Parliaments, probably had its roots in the Middle Ages.[4] The Receivers and Triers of petitions were in principle committees appointed to deal with what was then the chief business of the Parliament.[5] On several occasions the House of Commons appointed Treasurers to receive the subsidy and committees to draw up statutes or to examine accounts;[6] the Council sometimes acted through committees in the Middle Ages;[7] and the idea of a delegation of specific business was familiar to the lawyers. The chancellor from an early period delegated cases to the masters; and the common lawyers from the earliest period were bound to delegate the decision of all questions of fact to a jury. (4) Redlich has pointed out that all Parliamentary deliberation is cast into the form of a debate upon some specific motion. "It is not a series of independent orations but is composed of speeches and replies."[8] But it was a debate as to the issues to be enrolled composed of speeches and replies, which formed, as the Year Books show us, the chief part of the lawyer's work in court;[9] and it is not at all unlikely that it was their influence which thus created one of the leading characteristics of Parliamentary deliberation. And it is quite clear that some of the rules of debate—e.g. the rules as to the citation of documents in the House, are founded on the lawyer's rules as to evidence.[10] (5) When we first get a clear account of Parliamentary procedure we are struck by the minute attention paid to matters of form. The absence of the proper

acte du Parliament, et le meindre partie ne voillent my agreer a cel act, uncore ce sera bon statute a durer en perpetuity," *per* Littleton.

[1] Below 440. [2] Above 340-341.

[3] Brooke, Ab. *Conscience* pl. 15—Y.B. 8 Ed. IV. Trin. pl. 1; above 308.

[4] Redlich, op. cit. ii 203.

[5] Vol. i 359; for a note of their early history see McIlwain, The High Court of Parliament 251-256.

[6] In 1340 a joint committee of Lords and Commons was appointed to draw up statutes; in 1406 it was requested that certain of the Commons should be present at the engrossing of statutes; in 1341 a committee was appointed to investigate the accounts of the last subsidy, Redlich, op. cit. ii 203.

[7] Select Cases before the Council (S.S.) xliv.

[8] Redlich, op. cit. iii 51. [9] Below 554; vol. iii 635.

[10] Redlich, op. cit. iii 60; ibid at p. 82 the learned author says that probably the rules of debate and the order of procedure are "real statements of old established usage."

form of endorsement on a bill sent to the Lords,[1] the absence of a single letter in a precept addressed by the sheriff to his bailiffs,[2] the use by the Lords of paper instead of parchment for their amendments[3] were serious matters to be gravely discussed. When we remember the character of the common law procedure of the fifteenth century,[4] we cannot help suspecting the influence of the lawyers. (6) Coke says:[5] "As every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the High Court of Parliament hath also its own peculiar law called the *lex et consuetudo Parliamenti.*" This law is, like the common law, to be ascertained from the precedents to be found in the Parliamentary records;[6] and, in the House of Commons, the relation of the Speaker to this customary law is strikingly similar to the relation of a judge to the common law and to the rules of his court.[7] Thus the whole idea of Parliamentary Privilege, which developed with the consolidation of the powers of Parliament, springs from the notion that it is a court which like other courts must have its peculiar and appropriate privileges; and to the end many of these privileges—notably the power to imprison for contempt—retain a strong analogy to the privileges of other courts.[8] (7) Like the other courts of law in the Middle Ages, Parliament had, as we have seen, its separate rolls, which were conclusive evidence of its proceedings.[9]

Because, from the first, Parliament had been regarded as possessing the status of a superior court, its powers were never fettered by those archaic rules which, as we shall see, so seriously hampered the usefulness of the representative assemblies of the

[1] D'Ewes, Journal 303.
[2] Ibid 556.
[3] Ibid 575-577.
[4] Vol. iii 625 and n. 2.
[5] Fourth Institute 14; cp. Y.B. 7 Hy. VII. Trin. pl. 1 p. 16, "Chescun court sera pris solonque ce que ad este use—et issint de l' Eschiquier et Banc le Roy, et Chancery, et issint del Court de Parlement."
[6] Redlich, op. cit. ii 4, 5.
[7] Ibid ii 144, 145, "This duty of the Speaker's [the duty of interpreting the law and custom of Parliament] . . . may best be understood by comparing it with the corresponding attitude of an English judge to the law which he administers. The immense and many meshed net of the common law with its thousands of decided cases wraps him in its folds, but gives him in compensation thousands of chances to use the unwritten law stored up in precedents for extending the law itself by exposition, even for creating new law: so, too, is it with the Speaker. Behind the comparatively meagre body of positive enacted rules stretches the wide expanse of century long parliamentary usage, as recorded in the journals of the House. Here, too, the Speaker has the opportunity of drawing new judge-made law out of the old decisions."
[8] It was said in 1593 (D'Ewes, Journal 514) that, "This court for its dignity and highness hath privilege, as all other courts have; and as it is above all other courts, so it hath privilege above all other courts; and as it hath privilege and jurisdiction too, so hath it also coercion and compulsion."
[9] Y.B. 33 Hy. VI. Pasch, pl. 8 p. 18, "Le court de Parlement est le plus haut court le Roy ad, et si bien seroit que chescun maner chose ou Act que est material et fait illonques, la reason seroit estre enrole."

continent.[1] Archaic rules had been already banished from the superior courts by the lawyers of Bracton's school, before Parliament had made its appearance as a settled body.[2] Because it was regarded as the highest court known to the law, the lawyers never took a narrow or a technical view of its powers and privileges. The judges in the fifteenth century declined to give an opinion as to their extent.[3] Thus as its powers expanded it was able to develop on its own lines. It was helped by the technical learning of the lawyers, and was not hindered by the narrow unreasonableness of many of their technical rules. Consequently it acquired ample privileges and a flexible code of procedure which made it an organ of the state as definite as the council, or as any of the courts of common law, but with a perfectly distinct character of its own.[4] Its acts and proceedings were duly recorded like those of the other courts; and this gave them a permanence and an authority which enabled the power which it had acquired in the Middle Ages to be used as precedents in a later age.[5] But this consequence will not be fully realized till the seventeenth century. In the Middle Ages the most striking consequence of this development was the evolution of a new form of enacting statutes, which enabled full effect to be given to Parliament's claims to legislative authority.

[1] Bk. iv Pt. I. c. 1. [2] Above 244-252. [3] Below 445 n. 6, 561.

[4] There is an instructive argument in Y.B. 19 Hy. VI. Pasch. pl. 1 p. 64 which illustrates at once the lawyers' rooted habit of regarding Parliament as a court, and the fact that even the lawyers were beginning to see that it was something very different from an ordinary court; counsel argued that a tax granted by Parliament was a profit of the court of Parliament and "le Roy peut granter les profits de sa Court de Parlement come il peut de ses auters Courts devant que le chose grant soit in luy," but *Newton* pointed out that grants of taxes by Parliament were wholly different things; for the profits of other courts, "sont chose a luy accrues per cause d'un forfait fait a sa Ley . . . mes c'est XV est un grant de voluntate populi sui spontanea, qui preuve que il n'est droit en luy devant le grant par inheritance que il ad en ses Courts;" no doubt there is a tendency to talk of statutes as judgments of the Parliament see e.g. Y.B. 7 Hy. VII. Trin. pl. 1 p. 15, "un Act de Parlement n'est forsque judicum," *per* Fineux; but as early as Henry IV.'s reign the two things were seen to differ, see e.g. Y.B. 8 Hy. IV. Mich. pl. 13 p. 13, "Quant a ceo que vous dits que l'ordinance fuit un jugement en le Parlement il n'est my issint," *per* Gascoigne; in Y.B. 4 Hy. VII. Trin. pl. 6 Townshend and Brian agree that there is a difference between the repeal of an act of attainder by another act, and the reversal of an erroneous judgment.

[5] I agree with Mr. McIlwain, High Court of Parliament 230 n. 1 that Professor Redlich is wrong when he maintains (Procedure of the House of Commons i 24, 25) that the conception of the House of Commons as a court has had no influence on its procedure and order of business but that that procedure and order of business "have from the first grown out of the political exigencies of a supreme representative assembly with legislative and administrative functions;" I think that the fact that the lawyers were able to regard it as a court made them ready to assist in its development; and they naturally adopted judicial analogies. On the other hand I think that Mr. McIlwain presses the analogy to a court too far. The lawyers might talk of it as a court; but as the reference to the Y.BB. in the last note shows, they were quite alive to its essential differences from any other court.

The Legislative Authority of Parliament

In the thirteenth century the legislative authority of the country was the king, who, with the advice of his council or Parliament, issued new laws or ordinances. Even after the establishment of parliamentary government the king continued for some time to be the initiator, and by far the most important factor in the making of new laws.[1] In 1349 it was said that "the king makes the laws with the assent of the peers and the commons, and not through the instrumentality of the peers and the commons."[2] This does not mean that the king could make laws as he pleased, nor does it mean that he was free to disobey the existing law. As we have seen, the common lawyers, in common with many other mediæval thinkers, laid it down that, the law was a rule of conduct binding all the members of the state including the king;[3] and political writers argued in the fourteenth and fifteenth centuries,[4] as they had argued in the thirteenth, that this limitation was no diminution of the royal power. It merely limited the king's power to do evil, and this was no limitation—an idea which is perhaps one of the roots of the later doctrine that the king can do no wrong.[5] These ideas, in fact, are the basis of Fortescue's comparison between the *dominium regale* and the *dominium politicum et regale*. In the former polity the laws depend on the absolute will of the prince. In the latter they are the sinews which bind together all parts of the body politic—head and members alike.[6] He thus put into abstract form the general feeling that the whole framework of society depended upon the due maintenance of the law. That feeling was strengthened by the growth of the powers of Parliament; and the fact that Parliament and the lawyers worked together popularized and strengthened the lawyers' conception of the royal prerogative as "a legal institution subject to definite

[1] Stubbs, C.H. ii 624, "Whether the king redresses grievances by ordinance or by statute, he is really acting as legislator. Although in one case he acts by the advice of his council and in the other by the counsel and consent of the estates of the realm, the enacting power is his;" Gneist, C.H. ii 119.

[2] "Et fut dit qui le Roy fit les Leys per assent des Pers et de la Commune et non per les pers et la Commune," Y.B. 22 Ed. III. Hil. pl. 25.

[3] Above 252-254; "we understand that he [the king] wishes to be guided by right and reason in his own court as others will be," *per* Herle *arg.* Y.B. 6 Ed. II. (S.S.) 74; cp. Ehrlich, Vinogradoff, Oxford Studies vi 116-117.

[4] De Officio Regis (W.S.) 94, "Rex subicitur legi proprie imperio legis divine, sed non imperio legis proprie. . . . Rex ergo, in quantum caput regni, debet ministrare legi proprie voluntarie ex imperio legis superioris;" cp. Nicolas i 84, 85—advice of the council to Richard II.; Fortescue, De Laudibus c. 14, "To be of habilitie or power to do evil (as is the king that regally doth rule, and that with much more liberty than the king that hath a politic dominion over his people) is rather a diminution than an increase in power."

[5] Vol. iii 465-466.

[6] De Laudibus c. 13.

rules and limitations."[1] There is no doubt that Coke's emphatic words on this topic represent both the letter and the spirit of his authorities.[2]

Although, then, the king was the most important factor in the making of a new law, the great position assigned to the law required that he should act with grave deliberation if it was intended to add to or alter it. That the law should be fixed and stable, that there should not be too many laws to increase the burden of administration and to perplex the subject, was the ideal of the mediæval statesman.[3] As the system of the common law grew more elaborate, knowledge of the law became more and more confined to the legal profession. But it was felt that at least the more important legislative innovations should be known; and measures were taken for their publication in shire and borough[4]—though it was held in 1366 that such publication was not necessary for their validity, "for so soon as Parliament has concluded anything the law presumes that all know it, since Parliament represents the whole body of the kingdom."[5] Publication was however very necessary, for, as we have seen, knowledge of the law was essential to all who had property to protect.[6]

Since the king, acting on the advice of his council or Parliament, was the person who, at the beginning of this period, both initiated legislation and framed the laws, it did not appear anomalous that he should act upon the information of any considerable body of his subjects, such as, for instance, the merchants or the clergy. Thus we get laws which were made by the king on the petition of both these classes.[7] And, as the king was clearly the executive authority, we get ordinances, the legislative force of which it is difficult to estimate. Probably we should

[1] Vinogradoff, L.Q.R. xxix 280.

[2] Second Instit. 74, "It is a dangerous thing to alter or shake any of the fundamental rules of the common law, which in truth are the main pillars and supporters of the fabrick of the commonwealth;" cp. Y.B. 19 Hy. VI. Pasch. pl. 1, "La Ley est le plus haut inheritance que le Roy ad; car par la Ley il meme et toutes les subjects sont rules, et s'il ce Ley ne fuit, nul Roy, ny nul inheritance serait;" R.P. i 477, no. 101—the king refuses to give orders to the judges as to a petitioner's suit, "Le roi put maunder curtesie Lettres par son Privy Seal, quil feit aide en tant com homme purra sans Ley offendre, mes la Ley ne put il desturber;" De Officio Regis (W.S.) 55.

[3] De Officio Regis (W.S.) 55, "Stat autem regimen regni in paucarum et justarum legum institucione."

[4] Cooper, Public Records i 200, 201; members were expected to give an account of their doings to their constituents, R.P. iii 147 (6 Rich. II. no. 19); this idea lasted on till the latter part of the seventeenth century, and to it we owe the valuable series of letters which Marvel wrote to his constituents in Charles II.'s reign.

[5] Y.B. 39 Ed. III. Pasch. p. 7 *per* Thorpe, C.J.

[6] Above 416.

[7] Stubbs, C.H. ii 443, 576, 648, 649; R.P. ii 149 (18 Edw. III. no. 8); the dealings with the merchants took the form of grants of privileges in return for grants of money.

represent the views held at the beginning of the fourteenth century if we said that the king could act freely within the law as the executive authority of the country; that if he wished to add to or to alter the law he must act upon the advice of either the lords and the commons or perhaps of some large part of his subjects,[1] such as the merchants or the clergy, in cases where the proposed legislation specially concerned their interest; and that, though he might, as part of his executive functions, delay, or perhaps suspend, the operation of a law for adequate causes,[2] he could not deliberately repeal that which had become accepted as part of the common law.[3]

Thus at the end of the thirteenth and at the beginning of the fourteenth century it would hardly have been possible to give a very precise answer to a question as to the whereabouts of the legislative power in the state. We might say, as was said in 1322, that a statute should be enacted with the common consent of the estates of the realm.[4] But this still leaves very much at large questions as to the definition of what is common consent, and as to the ways in which a statute differs from a mere ordinance.[5] In fact, it is only gradually and in consequence of the growing importance of Parliament that a statute comes to be regarded as an enactment of the king and Parliament. The action of Parliament gradually separates those enactments to which it has consented from those to which it has not consented; and Parliament gradually asserts a right to the initiation of legislation, and a control over the manner in which a statute is framed.

In the first place, Parliament interposed to prevent ordinances issued by the king on the petition merely of the clergy or the merchants from being reckoned as statutes unless they had received its approval.[6] This clearly tended to separate enactments made upon the petition of the Parliament from enactments made without such petition—the common petitions of Parliament which, if assented to, will become Acts of the Parliament, separate themselves from the other petitions.[7] That the former enactments were deliberately disregarded at the royal

[1] Parliament protested against Acts made on the petition of an individual, R.P. ii 230 (no. 39).

[2] R.P. i 292 no. 19 in reply to a petition it is said, "Propter duritiem que ex statuto, etc., conquerentibus frequenter accidebat, ordinatum fuit per Regem . . . et ejus Consilium quod assisæ caperentur quotiens Justiciarii ad hoc vacare possent . . . non obstante statuto."

[3] Above 308; R.P. i 416 no. 2 it is said in reply to a petition of the archbishops and bishops, "Il ne put estre fait saunz novele Ley; laquele chose fere la Communialte de la terre ne vult mie unkore assenter;" cp. E.H.R. xxviii 118 seqq.

[4] Vol. i 360; above 410 n. 2.

[5] Stubbs, C.H. ii 636, 637.

[6] Above 436.

[7] Pollard, Evolution of Parliament 118 seqq.

pleasure was matter of complaint both in Richard II. and Henry VI.'s reigns.[1] In the second place, the fact that such enactments were enrolled upon a separate Statute Roll still further emphasized the distinction. But, as we have seen, we cannot take the entry upon the Statute Roll as excluding all enactments which are not so entered. There are many enactments which, though they are not entered upon the roll, have yet been received as statutes, because they have clearly been assented to by king, lords, and commons.[2] We cannot as yet expect to find any external or formal tests of this character. The difference between laws and ordinances did not turn merely upon the question whether they were assented to by all the estates of the realm. A good deal depended upon the question whether the enactment in question was intended to make a permanent and a deliberate change in the law, or whether it was intended to be somewhat in the nature of a temporary provision of a more or less experimental nature. It is difficult to define the contents of the mediæval Statute Book, because much often depended upon the intention of the king and of Parliament; and this intention was not always expressed.[3]

It is a change which took place at the end of this period in the mode of enacting statutes which gradually solves these difficulties, and introduces a clear test as to the statutory quality of an enactment. In the fourteenth and at the beginning of the fifteenth century it was the king who, with the advice of the judges and others of his council, framed and enacted the statute upon the petition of the Parliament.[4] As the fourteenth century

[1] The evasion by Richard II. of statutes passed in Parliament calls forth the animadversion of the chroniclers. Walsingham (R.S.) ii 48 says in 1382, "quid juvant statuta parliamentorum cum penitus ex post nullum sortiantur effectum? Rex nempe cum privato consilio cuncta vel mutare vel delere solebat quæ in parliamentis antehabitis tota regni non solum Communitas sed et ipsa nobilitas statuebat;" Parliament in 1399 accused him of saying, "quod ipse solus posset mutare et condere leges regni sui," R.P. iii 419 (1 Hy. IV. no. 33); the same accusation appears in Cade's proclamation, "Item, they sey that owre sovereyn lorde is above his lawys to his pleyseur, and he may make it and brake it as hym lyst, withe owte eny distinction. The contrary is trew, and elles he shulde not have sworn to kepe it, the whyche we conceyvyd for the hyhest poynt of treson that eny soget may do to make his prynce renn in perjury," Three Fifteenth Century Chronicles (C.S.) 94, 95.

[2] Above 427.

[3] R.P. ii 113 (14 Ed. III. no. 8); ibid 133 (15 Ed. III. no. 61), "Les pointz a durer per Estatut et les autres per Chartre ou Patent;" ibid 280 (37 Ed. III. no. 39), "Disoient que bon est mettre les choses par voie d'Ordinance et nemye par l'Estatut aufin que si rien soit de amender puisse etre amende a preschein Parlement et issint est fait;" as early as Stephen's reign it had been argued that royal ordinances lasted only for the life of the king who issued them, E.H.R. xxiv 434; for the survival and application of this idea in the case of royal proclamations, see Bk. iv Pt. I. c. 1.

[4] Above 308. The judges clearly still had much to do with framing the statutes in Edward III.'s reign; R.P. ii 139 (17 Ed. III. no. 23) the commons say that such parts of a repealed statute as are not contrary to the law and to the prerogative are to be made into a statute by the judges and "autres sages;" Reeves, H.E.L. ii 291,

advanced, the initiation of legislation gradually passed from the crown to the commons and sometimes to the lords.[1] Under these changed conditions the practice of allowing the king to frame the text of the law upon the petition was found to possess serious inconveniences.[2] Some petitions might be simply allowed to slide.[3] To others many things might happen in the course of their conversion into a statute. A saving clause might be inserted in the statute which would go far to nullify its effect, or there might be no provisions in it providing a machinery for its enforcement.[4] The king might add clauses to it which wholly changed its scope—sometimes, even, he purported to make statutes founded on no precedent petition whatever.[5] The frequency of complaints of malpractices of this kind shows that they cannot all have been baseless. Henry V. was obliged to reply, to what is perhaps the earliest English petition in Parliament, that "fro hensforth nothyng be enacted to the peticions of his comune that be contrarie of hir askyng, wherby they shuld be bounde withoute their assent."[6] The terms of the petition show that the commons were beginning to claim for themselves a share in the legislative power. They claim to be "as well assenters as peticioners."[7] The effectual means by which they made good this position was a change in the mode of enacting statutes, which became general in Henry VI.'s reign.[8] It was the custom of the king, when he initiated legislation, to introduce complete bills to which the estates of the realm gave their consent.[9] This practice was adopted by private petitioners,[10]

[1] Stubbs, C.H. ii 642, "Until the reign of Edward II. almost all modifications of the existing laws were formally introduced by the king;" ibid 641, at the close of the fourteenth century "the petitions of the commons seem almost to engross the power of initiation."

[2] Stubbs, C.H. ii 628-636.

[3] E.g. R.P. ii 238 (25 Ed. III. no. 11)—petitions to be granted, confirmed, and sealed before the departure of Parliament; ibid iii 147 (6 Rich. II. no. 19).

[4] E.g. R.P. ii 165 (21 Ed. III. no. 8)—that the petitions for the common profit of the realm, "soient responduz et endossez en Parlement devant la Commune, issint qu'ils puissent savoir l'Endossementz et en avoir remedie solonc l'Ordenaunce du Parlement;" ibid iii 17 (1 Rich. II. no. 56); ibid iii 585, 587 (8 Hy. IV. no. 65).

[5] R.P. iii 266 (13 Rich. II. no. 30), "Item priont les communes que le Chanceller ne le conseil du Roy apres le Parlement finy facent null Ordinance encontre la commune Ley ne les anciens Custumes de la terre et Estatutz;" ibid iii 465 (2 Hy. IV. no. 45) complaint that certain matters were "autrement enactez et entrez en Rolle de Parlement que ne feust accordez a mesne cel darrein Parlement."

[6] R.P. iv 22 (2 Hy. V. no. 22) cited Hallam, M.A. iii 91.

[7] "Consideringe that the comune of youre lond, the whiche that is, and ever hathe be, a membre of youre parlemente, ben as well assenters as peticioners;" cp. R.P. iii 243 (11 Rich. II.), "La ou la Ley de la Terre est faite en Parlement par le Roi et les Seigneurs . . . et tout la Communalte du Roialme."

[8] Stubbs, C.H. iii 501; Hallam, M.A. iii 92.

[9] E.g. R.P. v 7, 8 (18 Hy. VI. nos. 17 and 19).

[10] E.g. R.P. iv 323 (6 Hy. VI. no. 20). It is also adopted by petitioners to the council, Nicolas v 156, 179, 180; vi 29, 255, 259, 282,

by the commons in the case of money bills,[1] and finally by lords and commons in all cases where legislation was initiated by them.[2] To these bills the king either consented or declined to consent. At about the same time a change in the form of the enacting words emphasized the position which both lords and commons had secured as partners in the work of legislation. Statutes are made not by the king at the request of the lords and at the petition of the commons, but "by the authority of Parliament." This phrase first appears in 1433, and, from the year 1445, it becomes a regular part of the enacting words.[3] The form used in Henry VII.'s reign is substantially that used at the present day.

Redlich has pointed out that it was the adoption of this procedure by bill which "completed the parliamentary edifice;" for it was not till this had taken place that Parliament, "stood out as a representation of the kingdom by means of two corporate bodies with equal rights; nor is it till then that a sure foundation was laid for the equal, or in money matters, the preponderant position of the House of Commons in legislation and politics."[4] That the Parliamentary edifice was thus completed was, as we have seen, due largely to that alliance between the two Houses and the lawyers which had the effect of placing at the service of the Houses the technical skill of the lawyers. We shall now see that this alliance, which had thus made Parliament an efficient assembly and developed its legislative authority, has had a large influence upon the development both of English institutions and of English constitutional and legal theory.

The Results of this Development of the Powers of Parliament

The results of this development of the powers of Parliament can be seen, firstly, in a growing differentiation between the institutions of government, and secondly, in the origins of the peculiarly English combination of the doctrine of the rule of law with the doctrine of the legislative supremacy of Parliament.

[1] E.g. R.P. iii 204 (9 Rich. II. no. 10).

[2] "Quædam cedula formam Actus in se continens," R.P. v 476 (1 Ed. IV. no. 17); cp. ibid vi 138 (14 Ed. IV.); and see Y.B. 33 Hy. VI. Pasch. pl. 8 for the parliamentary procedure then used; it is clearly settled and almost in its final form—though nothing is said as to three readings, cp. Pollard, Evolution of Parliament 329.

[3] Stubbs, C.H. iii 502-504; the form at present used is as follows, "Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present Parliament assembled, and by authority of the same." Professor Pollard's assertion (Evolution of Parliament 328) that in 1480 the judges held that a money grant of the commons was valid without the consent of the lords is supported by no real authority; it rests only on a dictum of counsel, and is contrary to Y.B. 33 Hy. VI. Pasch. pl. 8.

[4] Procedure of the House of Commons i 19, 20.

(1) The existence of this petitioning, taxing, and legislating body helped to introduce the distinction between a judicial court exercising judicial functions, and a legislative body exercising legislative functions. It was an altogether new species of court which was making its appearance in the English state; and it naturally affected very materially the sphere of the activity of the older judicial courts. It is useful to remember that it was the rise of Parliament which tended to make the judicial functions of the itinerant justices their most important functions,[1] and to confine the sphere of activity of the juries, summoned to assist the work of the central courts, mainly to judicial work.[2]

(2) We have seen that the doctrine that the law should govern the state was held by English lawyers and by many other mediæval thinkers.[3] But in England the alliance between the lawyers and Parliament gave to this doctrine a far more definite meaning and a far larger practical effect than in any other country. In England the theory that the law was thus supreme was something very much more than a doctrine of lawyers and political philosophers. It was a large premise which was used to justify logically the control over taxation and legislation which Parliament had acquired. England, Fortescue explains, is a *dominium politicum et regale*, a kingdom in which the law is supreme, because the king can neither change the laws nor impose taxes without the consent of Parliament.[4] Thus practically illustrated, that which in other countries remained an abstract legal doctrine, became the chief article in the political faith of the English people.[5] Moreover, this doctrine of the supremacy of the law became a far more practically workable principle by reason of its connection with Parliament. Abroad, as we shall see, the doctrine seemed to take the form of the supremacy of a fundamental law which no power in the state could change, and only the lawyers could interpret.[6] In England, at the close of the Middle Ages it was coming to mean the

[1] Vol. i 272. [2] Ibid 314.

[3] Above 252-254, 435.

[4] De Laudibus c. 18, "they proceed not from the Prince's pleasure as do the laws of those kingdoms that are ruled only by regal government . . . for so much as they are made not only by the Prince's pleasure, but also by the consent of the whole realm . . . and if it fortune those statutes, being devised with such great solemnity and witte, not to fall out so effectually, as the intent of the makers did wish, they may be quickly reformed, but not without the consent of the commons, and states of the realme, by whose authority they were first devised;" cp. The Governance of England c. 3, where the miserable condition of the French peasant is ascribed to the fact that the king can impose taxes without the consent of his estates.

[5] It was said in argument in Y.B. 19 Hy. VI. Pasch. pl. 1 p. 63, "Le Roy peut disinheriter un home et luy mettre a mort que est encontre la Ley, si le Parlement ne fuist," *per* Newton.

[6] Bk. iv Pt. I. c. 1.

supremacy of a law which Parliament could change and modify;[1] and because the lawyers worked in alliance with Parliament they rarely showed any desire to question the power of Parliament to make, change, or modify the law. The dicta of Coke in *Bonham's Case*,[2] to the effect that the courts may pronounce to be void such Acts of Parliament as are unreasonable or impossible to be carried into effect, are founded upon very little mediæval authority. It was once argued that a private Act of Parliament was null because it had not passed through all its proper stages. Kirkby, of the Rolls, and Faux, clerk of the Parliaments, were examined. In the end Fortescue, C.J., showed an obvious reluctance to take so unusual a step as that of adjudging an Act of Parliament to be null, even assuming that there had been irregularities in its passage through Parliament.[3] In fact, such dicta were really contrary to the principles of the common law as understood by Coke himself and other lawyers of the parliamentary school. The cases which Coke cites really only amount to decisions that the courts will, as a counsel of Edward III.'s

[1] I still hold this view in spite of Mr. McIlwain's criticisms of it, op. cit. 271-281; his instances are taken from cases which turn on the pre-Reformation view of the relationship between Church and State, vol. i 587. These cases I regard as a special, and a very intelligible exception to the ordinary rule, below 444. Similarly, I think that he has exaggerated the importance in England of the conception of a fundamental law which even Parliament cannot change (op. cit. chap. ii). It is as well to remember that Magna Carta itself, though in form declaratory, was after all enacted law. When the king and Parliament talked of fundamental laws in the seventeenth century (see McIlwain op. cit. 75-93) they were thinking of the rights which in their opinion the existing law gave to them. These rights they deemed to be fundamental in the sense that they were the basis of the constitution as they conceived it, not in the sense that King, Lords, and Commons could not change them. It is only very exceptionally (e.g. in R. v. Hampden (1637) 3 S.T. at p. 1235, and in Godden v. Hales (1685) 11 S.T. 1165) that we meet with the idea of a law which Parliament cannot change, and then only in the arguments of the extreme prerogative lawyers. Even they avoid using it if they have any more solid reasons to advance, below 445-446.

[2] (1609) 8 Co. Rep. 107, 118; S.C. 2 Brownlow 265. Coke cites Y.B. 8 Ed. 3 Pasch. pl. 26; Fitz., Abridgt. *Cessavit* pl. 42; and *Annuity* pl. 41. In the report in Brownlow the proposition is illustrated by putting the case of the crown allowing a man to be judge in his own case. That is assumed to be so legally or morally impossible that "the grant is void though it be confirmed by Parliament;" cp. Bl. Comm. i 40, "The law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this;" Dicey, Law of the Constitution (4th ed.) 59, 60. The chief, possibly the only clear, instance of this doctrine in the Parliament Rolls is the Duke of York's argument against the statutes entailing the crown on the Lancastrians, R.P. v 377 (39 Hy. VI. no. 15); it is pretty clear that neither he nor any one else attached much weight to it; cp. P. and M. i 491.

[3] Y.B. 33 Hy. VI., Pasch. pl. 8, "C'est un Acte de Parlement, et nous voillomus estre bien avise devant que nous anulloms ascun Acte fait en la Parlement: et paraventure le matter doit attendre jusques a le prochein Parlement adonquez nous poimes estre certifie par eux de la certeinte de la matter: mez non obstante nous voillomus estre avises que sera fait."

reign expressed it, interpret statutes "stricti juris."[1] They will interpret them, that is, so as to give them a meaning in accordance with established principle, and they cannot give any effect to them if they are meaningless. These are principles of interpretation which would be accepted at the present day.[2] It is possible that the professional jealousy felt by the common lawyers of statutory interferences with the principles of the law was more obvious at a later date, when the legislative and judicial parts of the constitution were more sharply separate. But the provisions of statutes have at all times evoked a grumbling criticism from bench and bar;[3] and, though at all periods some statutes have been submitted to a restrictive interpretation, the continued existence of the alliance between Parliament and the lawyers has always prevented the existence of any general disposition on the part of the lawyers to question the omnipotence of Parliament.[4]

Thus we may say that at the end of this period the legislative supremacy of Parliament is fully recognized. But it is, perhaps, needless to say that there were many questions relative to the legislative power in the state which were still unsettled. Within what limits could the crown and its council freely issue binding proclamations or ordinances? In what way could the undoubted power which the crown possessed of dispensing from or suspending the operation of statutes be reconciled with the legislative supremacy of Parliament?[5] To neither of these questions was any certain answer given until the seventeenth century. Again, no mediæval lawyer or statesman would have admitted that Parliament possessed theoretically unlimited powers of legislation.[6] The modern lawyer has no difficulty in keeping apart law and morals,

[1] Y.BB. 18 Ed. III. (R.S.) 130; 24 Ed. III. Trin. pl. 46 *Grene* says, "Touts les statutes que restreignent Comen ley sont stricti juris."

[2] See e.g. Ex pte. Blain (1879) 12 C.D. at p. 531, where Cotton, L.J., put the case of an English statute which purported to bind foreigners abroad. He said that in such a case the court might enforce it—though not necessarily, "because if the Act had clearly gone beyond the power of the English legislature, there might be a question. But that is not so here. All we have to do is to interpret an Act of Parliament which uses a general word, and we have to say how that word is to be limited, when of necessity there must be some limitation;" cp. Colquhoun v. Brooks (1888) 21 Q.B.D. at pp. 57, 58, where the same difficulty is discussed.

[3] Y.B. 24 Ed. III. Mich. pl. 105, "*Grene* granta bien en ceo ple que l'estatut fuit fait plus en damage du peuple, que en amendment de Commen Ley."

[4] Journal of the Society of Comparative Legislation (1900) 423.

[5] The dispensing and suspending power clearly belonged to the crown at this period, Stubbs, C.H. ii 624; Hallam, C.H. iii 60; cp. Maine, Early Law and Custom 164; L.Q.R. xxxviii 297-301. The Parliament only protests when it thinks that the king is making an excessive use of this power or of his power to pardon, Stubbs, C.H. ii 634, 635; 5 Edward II. c. 28; Plummer, Fortescue 83 n. 3.

[6] R.P. ii 41 (4 Ed. III. no. 52) there is a petition by certain persons who thought that the lands of the Templars should have escheated, and not have gone to the

and has, perhaps, some difficulty in thinking away his notions of sovereignty, and the series of ideas which flow therefrom. But though at the end of this period the modern territorial state was practically formed, no one had as yet constructed a political theory based upon the new conditions. The prevalent mediæval conceptions about law and politics would certainly have led lawyers and statesmen to deny the proposition that there were no limits to the things which could be effected by a statute. They would have conceded that Parliament was the supreme law-making authority in the state, but they would have denied that this was equivalent to asserting its legislative omnipotence—the law of the state made by Parliament was only one among many kinds of law. They would have denied, for instance, the competence of Parliament to pass a law which contravened those fundamental moral rules which seemed to be a part of that law of nature which natural reason teaches all mankind[1]—the distinction between *mala prohibita* and *mala in se* was not easily banished from the law. Then, too, Church and State were still separate; and the large part of the nation which was in orders of one kind or another would certainly have denied that Parliament could freely legislate about matters which fell within the ecclesiastical sphere.[2] At a much later date Sir Thomas More suffered death rather than renounce his assured belief that the supremacy of the pope over the church could not be taken away by Act of Parliament.[3]

Hospitallers. They declare roundly that the statute which enacted this is contrary to law, "Et in lequel Estatute poet estre trowe que les Justices ne s'assentirent point; car ils ne poient pur lour serment par la disheritaunce du Roy et de ses gentz. Et disoient que se sunt contrarie a Ley, issi que cel Estatut se fist contre Ley et contre reson;" cp. L.Q.R. xxix 278.

[1] For the law of nature and its treatment by English lawyers see App. II.; above 442 n. 2.

[2] Vol. i 586-587, 589. See e.g. Y.B. 21 Hy. VII. Hil. pl. 1, pp. 1-5 cited McIlwain, op. cit. 277, 278; we may note that Vavisour (pp. 3, 4) argued that the king could be made a parson by Act of Parliament—various lords, he said, had parsonages, "issint n'est impertinent que la Roy sera dit parson: et especial per le Act del Parlement. Car en temps le Roy R. 2 il fuit division pur le Pape en temps de vacation, si come il fuit or tard, et pur ceo que il fuit certifie au Roy et son Conseil, que certein Prestres in Anglia avoient offendus in divers points ils furent per Act de Parlement deprives de lour benefices;" to this Frowicke, C.J., replied that if lords had parsonages this was by the consent of the Pope, and that, "Un acte temporal sans le assent del Supreme teste ne poit faire le Roy parson;" the argument based on the anti-ecclesiastical legislation of Richard II.'s reign is interesting, as it foreshadows Henry VIII.'s own argument in the preamble to the Statute of Appeals, vol. i 589-590; similarly Brian's statement, Y.B. 10 Hy. VII. Hil. pl. 17, that "Rex est persona mixta car est persona unita cum sacerdotibus Saint eglise," foreshadows the claim to be supreme head of the church holding directly under God.

[3] Roper, Life of More, tells us that Sir Thomas More, when asked if he had anything to say why judgment should not be passed against him, answered, "Forasmuch as this indictment is grounded upon an Act of Parliament, directly oppugnant

These ethical limitations upon the legislative supremacy of Parliament gradually disappeared in the course of the sixteenth and seventeenth centuries, with the change in the relations of church and state effected by the Reformation, the rise of the modern territorial state, and the accompanying growth of the modern doctrine of sovereignty.[1] But we shall see that, though these limitations ceased to fetter Parliament's legislative supremacy, the ideas which inspired them had yet a great part to play in political controversy. They gave rise to the belief in the existence of indefeasible rights, superior to any mere state authority; and this conception was used to advocate a right of resistance both to tyranny and to popular encroachments upon royal rights.[2] The conception of indefeasible rights played a leading part in Locke's defence of the Revolution of 1688;[3] but it is perhaps more apparent in royalist views as to the extent of the prerogative, both in the Middle Ages and in the seventeenth century. Kings, who often found the rules of the statute or common law unduly restrictive of their prerogative, found it necessary to have recourse to the doctrine of an indefeasible prerogative of which no statute could deprive them.[4] Thus the notion that the crown had certain indefeasible prerogatives appeared in Richards II.'s reign,[5] and at the time of the wars of the Roses;[6] and large theories were based upon these mediæval dicta by royalist politicians of the late sixteenth and seventeenth centuries.[7] But it is significant that these theories of the indefeasible rights of peoples or of kings, superior to any law of the state, have had far less influence in England than on the continent. The theory

to the laws of God and his holy church, the supreme government of which or any part thereof may no temporal prince presume by any law to take upon him, . . . it is therefore in law among Christian men insufficient to charge any Christian."

[1] Bk. iv Pt. I. cc. 1 and 6.

[2] Ibid; cp. Gierke, Political Theories of the Middle Ages (Maitland's Tr.) 83.

[3] Bk. iv Pt. I. c. 6.

[4] Figgis, Divine Rights of Kings, 27-29.

[5] R.P. iii 224 (10 Rich. II. no. 35). The king protested "Que pur riens qu'estoit fait en le dit Parlement, il ne vorroit que prejudice avendroit a luy ne a sa Corone;" cp. ibid. 233-234 for the answers which some of the judges gave Richard in 1388 as to the extent of his prerogative; we may perhaps see a slight hint of this theory in R.P. ii 131 (13 Ed. III. no. 42); cp. Y.B. 14, 15 Ed. III. (R.S.) lviii-lxii.

[6] R.P. v 376 (39 Hy. VI), the judges declined to give any opinion as to the Lancastrian and Yorkist titles to the throne because "the mater was so high and touched the Kyngs high estate and regalie, which is above the lawe and passed their lernyng;" so Fortescue, Works 532 (cited by Mr. Plummer 53 n. 4), says "that he had not labored or studyed in any faculte except the lawes of this londe, in which the studientes lerne full lytell of the right of succession to Kyngdomes"—however, Fortescue wrote much on this subject, below 569. We see too, R.P. v 239 (32 Hy. VI. no. 26), that the Privilege of Parliament is spoken of in much the same way as something quite outside the law: "It hath not been used aforetyme that the Justiceys shuld *in eny wyse* determine the Privilegge of this high Court of Parlement."

[7] Bk. iv Pt. I. cc. 1 and 6; for their statement in an extreme form see Godden v. Hales (1686) 11 S.T. 1165.

of the king's indefeasible right might have become important if the Stuart kings had succeeded in making good their claims. But, after the Revolution, this theory finally disappeared from English law. The theory of the people's indefeasible right never possessed any great practical importance because, fortunately for the English constitution, the cause of constitutional liberty has never been obliged to place much dependence upon it. The supremacy of a law which could be changed only by Parliament was, as we shall see, a far stronger, a far more manageable, a far more efficient protector of that liberty.

It is not till these last days that Parliament itself has allowed exemptions from the rule of law in favour of the supposed indefeasible rights of turbulent Trades Unions, conscientious churchmen, and conscientious objectors, to the great detriment of the peace and stability of the state. We shall see that the firm establishment of the sovereignty of the state and its law over all persons and causes, which was achieved in practice in the sixteenth century, and recognized in theory in the seventeenth century, was the condition precedent for the progress of Western civilization. Recent experience makes it obvious that a state which disregards the experience and the lessons of the past, and deliberately weakens its own sovereignty, does so at its peril.

Legal Development Illustrated by the Statutes

The settlement of the constitution of Parliament, the development of its legislative authority, and the more complete differentiation between the judicial, executive, and legislative powers in the state, give to the Statute Book an importance of a different kind to that which it possessed in the preceding period. In the preceding period we look to the Statute Book for the great statutes which outlined the course of legal development for the two following centuries. In this period a large—perhaps the largest—part of our private law is due to the manner in which the principles of the law of the thirteenth century were worked out in detail by the common law courts. The Statute Book is interesting rather as marking the changes in the social, constitutional, and political condition of the nation, and as pointing, therefore, to the origin of many long-lived rules of law, which were necessitated in the first instance by these changes, than as the direct source of the rules of private law. Statutes cease to regulate continuously the development of such rules. They intervene occasionally when, as Sir C. Ilbert says, "the development of common law rules has failed to keep pace with changes in social and economical conditions," or "when a too servile

adherence to precedents has forced those rules into a wrong groove."[1] So far as purely legal topics are concerned, they amend and modify rather than govern the technical development of the law. The control asserted by Parliament over the executive; the completion of the judicial machinery of the common law by the institution of the office of justice of the peace, by the development of the powers of the justices of Assize, and by the growth of the trial by jury; the gradual delimitation of the spheres of temporal and ecclesiastical jurisdiction, and the curtailment of papal interference with national affairs; the definition of the sphere of treason necessitated both by the clashing interests of king and feudal lord, and by the growth of the modern state; the legislation called into being by the decay of villeinage and the growth of the free labourer; the legislation called for by the prevalent ideas as to the need for securing fair trade, both within the kingdom and without; the legislation called for by the need for some rules regulating the dealings of English subjects with alien friends; the legislation necessitated by the prevalence of internal disorder—these are some of the leading topics dealt with by the statutes of the fourteenth and the fifteenth centuries. Of the important legal developments within the common law system, such as the development of the doctrines of tenures and estates,[2] and the growing importance of actions of trespass, trespass on the case, and assumpsit,[3] we catch only occasional glimpses between the lines of the Statute Book. We can say the same thing of the important legal developments outside the common law, such as the beginnings of the Use and the equitable jurisdiction of the chancellor, and the beginnings of our maritime law and the rise of the court of Admiralty.

To enumerate all the statutes of this period would be tedious and useless. We shall get a better idea of the main lines of the legislation of the period if we group some of the more important statutes under certain definite heads. I have already dealt, in the first volume, with the leading statutes which relate to the development of the jury and of various law courts which administered the common law.[4] I have also said something in that volume and in the last chapter of the legislation upon ecclesiastical matters.[5] Here I shall say something of the other statutes of this period under the following heads: The control of the executive; the criminal law and the law of tort; abuses of legal forms; the free labourer; classes of society; internal trade; external trade; international relations; amendments of

[1] Legislative Methods and Forms 6.
[2] Below 576-582.
[3] Below 455-457; vol. iii 350-351, 429-453.
[4] Vol. i chap. iii.
[5] Ibid 585-586; above 304-306

the common law; the language of the law; new developments outside the common law.

(1) The control of the executive.

The statutes relating to this subject are numerous and detailed, but they are rather the subject of constitutional than of legal history. Some of the ordinances made in 1312 [1] embody complaints which continued to be the subject of remonstrance all through this period. Improvident gifts made by the king,[2] security for the proper application of the revenue,[3] the abolition of unlawful customs,[4] abuses connected with the forests,[5] the indiscriminate giving of pardons and protections, the issue of writs which delayed justice,[6] the demand for ministers whom the nation could trust,[7] regular sessions of Parliament [8]—these are all complaints and demands which are the subject matter of many statutes all through this period, and of a still greater number of petitions upon the rolls of Parliament. Other statutes are directed against the practice of forcing persons to serve in war who are not compelled by their tenure so to serve, against unlawful arrest and imprisonment, against the practice of sending commands to the judges to the hindrance of justice.[9] Then again we have a series of statutes which attempt to restrain illegal practices on the part of the royal officers. Many statutes provide that sheriffs shall make proper returns,[10] that they shall give proper acquittances to debtors who have paid their debts,[11] that they shall not lose or make away with the indictments found at their tourns,[12] that they shall not cause persons to be indicted merely to make money,[13] that they shall not let their hundreds to farm, nor take anything of persons arrested,[14] that they shall only hold office for a year,[15] that they shall duly return the elected members of Parliament, that they shall honestly levy and pay them their wages.[16] In the same way we find statutes passed to

[1] Statutes (R.C.) i 157-168.
[2] §§ 3 and 7.
[3] §§ 4 and 8.
[4] §§ 10 and 11.
[5] §§ 18 and 19.
[6] §§ 28, 32, 34, 37.
[7] §§ 13-18, 39.
[8] § 29.
[9] E.g. 1 Edward III. st. 2 cc. 1, 5, 6; 2 Edward III. cc. 2, 3, 8; 5 Edward III. c. 9; 10 Edward III. st. 1 c. 2; 14 Edward III. st. 1 cc. 15, 20, 21; ibid st. 2; 15 Edward III. st. 1 cc. 3, 4; 20 Edward III. c. 1; 27 Edward III. c. 2; 37 Edward III. c. 18; 42 Edward III. c. 3; 11 Richard II. c. 10; 13 Richard II. st. 1 c. 16; ibid st. 2 c. 1; 11 Henry IV. c. 9; 1 Richard III. c. 2.
[10] E.g. 13 Edward I. st. 1 c. 13; 1 Edward III. st. 2 c. 17; 4 Henry VI. c. 1; 18 Henry VI. c. 10.
[11] 14 Edward II. (Statutum de vicecomitibus).
[12] 4 Henry VI. c. 1; 1 Edward IV. c. 2.
[13] 4 Henry VI. c. 1; 9 Henry VI. c. 7.
[14] 4 Henry IV. c. 5; 23 Henry VI. c. 9; Dive v. Manningham (1553) Plowden 62.
[15] E.g. 14 Edward III. st. 1 c. 7; 28 Edward III. c. 7; 42 Edward III. c. 9; 23 Henry VI. c. 7.
[16] 11 Henry IV. c. 1; 23 Henry VI. cc. 10, 14.

regulate the fees taken by the officers of the Exchequer,[1] and to restrain the illegal acts of such officials as escheators and purveyors.[2] Some of these statutes were perhaps too general to be very effectual. They became more particular and detailed in the fifteenth century. Whether they were on that account more effectual may, as we have seen, be doubted. What was more effectual was the growth of the common law principle that executive officers who act beyond their powers are personally liable to an action at law. This principle was not applied to all royal officers in the thirteenth century;[3] but the Year Books show us that it was consistently and constantly applied to such officials as sheriffs, holders of franchises, and collectors of subsidies. Its application was due partly to these statutes,[4] and partly to the growth of the idea that, as wrongs should not be imputed to the king, they must be imputed to the servant who did them. But the latter idea is as yet in its infancy;[5] and the principle is therefore applied chiefly to officials of a humbler type, and not to the more exalted servants of the crown. When it is applied to all officials, high and low alike, we shall get the doctrine—famous in constitutional law—of ministerial responsibility. For the present, if we except the rare cases of impeachment, which are apt to be grounded rather on political resentment than upon legal wrongdoing, the doctrine is as yet limited in its scope.

(2) The Criminal law and the law of Tort.

By far the most important statute dealing with the criminal law is Edward III.'s statute of treasons.[6] It clearly distinguished treason from felony. It specified seven offences which were for the future to be high treason.[7] It gave, as we have seen, a somewhat obscurely worded power to declare other offences treason, of which not much use was made.[8] It distinguished high treason from petit treason.[9] High treason it declared to be

[1] 5 Richard II. cc. 12-16; 33 Henry VI. c. 3.

[2] E.g. 36 Edward III. st. 1 cc. 2, 13; 23 Henry VI. c. 1; Reeves, H.E.L. 251, 252, 254-256.

[3] Ehrlich, Vinogradoff, Oxford Studies vi 25, 50-51, 129, 141-142, 200.

[4] Ibid 50-51, 111. [5] Vol. iii 465-466. [6] 25 Edward III. st. 5 c. 2.

[7] Vol. iii 287-291. The offences may be shortly summarized as follows: (1) To compass or imagine the death of the king, queen, or his eldest son. (2) To violate the queen, or the king's eldest daughter unmarried, or the wife of the king's eldest son. (3) To levy war against the king. (4) To be adherent to the king's enemies. (5) To counterfeit the king's seal or money. (6) Knowingly to bring false money into the realm. (7) To slay the chancellor or any of the judges while performing their duties.

[8] Vol. i 377-378.

[9] Petit treason, as defined by the statute, was "when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate to whom he oweth faith and obedience." It was abolished in 1828 (9 George IV. c. 31 § 2) and such offences were reduced to the rank of murder.

the offence against the king; petit treason the offence against a lord—thus preserving an interesting survival of the old Anglo-Saxon idea that treason is a form of treachery.[1]

During the remainder of this period there were a few statutes passed which temporarily extended the offence of treason. They were passed, as many similar statutes at later periods of our history have been passed, either to meet the political necessities of the day or to repress a particularly prevalent offence. In 1381, after the insurrection of the villeins, it was made treason to begin a riot.[2] In 1397 the packed Parliament of Richard II. enacted that it should be treason to compass not only the king's death, but also his deposition or the rendering up by anyone of his liege homage; and that any who procured or counselled the repeal of the statutes passed in that Parliament should be guilty of treason.[3] This statute was of course repealed by the first Parliament of Henry IV.'s reign.[4] Under the Lancastrians there are a few miscellaneous extensions of the law. In 1415 clipping, washing, and filing money was declared to be treason.[5] In 1423 those who allowed prisoners charged with treason to escape were declared guilty of treason.[6] In 1429 extorting money by threats to burn houses was made treason.[7] The need for taking adequate measures for the enforcement of international obligations had been the cause of a declaration under Edward III.'s statute that killing an ambassador was treason;[8] and for similar reasons the offence was extended in 1414 to breakers of truces and violators of safe conducts.[9] Occasionally we met with a petition that a crime, such as murder, committed under circumstances of great aggravation, shall be treated as treason.[10]

We see as yet but few signs of that doctrine of constructive treason which, in the future, was destined to convert a statute, designed to protect the king, into an efficient protector of the state.[11] Some of the provisions of the statute of 1397 sufficiently illustrate this. In the seventeenth cen-

[1] Above 48.
[2] 5 Richard II. c. 6.
[3] 21 Richard II. cc. 3 and 4.
[4] 1 Henry IV. c. 10.
[5] 4 Henry V. c. 6.
[6] 2 Henry VI. c. 21.
[7] 8 Henry VI. c. 6.
[8] The case of John Imperial, the Genoese ambassador, R.P. iii 75 (3 Rich. II. no. 18); see Hale, P.C. i 263; Stephen, H.C.L. ii 252; vol. i. 377-378.
[9] 2 Henry V. c. 6.
[10] R.P. iv 447 (11, 12 Hy. VI. no. 43). In this case the guilty person was going on a pilgrimage; the idea of the petition was to evade ecclesiastical claims by making out the offence to be treason and not merely felony.
[11] See vol. iii 292-293, and for the growth of this body of law see Bk. iv. Pt. II. c. 5 § 1; there is one somewhat extravagant dictum in Y.B. 19 Hy. VI. Mich. pl. 103 to the effect that a mere imagination of the king's death without any overt act would suffice to make a man guilty of treason; for an explanation of this see vol. iii 373 and n. 4.

tury no statute was needed to make it treason to conspire to depose the king. In the fourteenth and the fifteenth centuries, as we shall see, the judges were averse to interfering with politics;[1] and indeed to that age the rougher weapon of attainder was more congenial. It was a speedier mode of dealing with political opponents than the formal trial of later days, and the inevitable sentence for committing the treasons constructed by the judges on the slender foundation of a statute which invited a wide construction because it had become inadequate.

To the list of felonies known to the common law several additions were made by statute. Some were connected with the laws as to the coinage.[2] Others were connected with the laws as to trade.[3] Others were connected with that abuse and perversion of legal process which was rampant all through this period.[4] Of other new felonies not falling under any distinct categories we may mention the following:—stealing a hawk,[5] cutting out the tongue and blinding,[6] embezzling the records of the king's courts,[7] desertion of soldiers,[8] non-appearance of a servant in answer to a summons for the embezzlement of his deceased employer's goods.[9] In the felony of multiplying gold and silver we get an allusion to the trade of the alchemist.[10] Heresy is an offence which stands by itself. As we have seen, a statute of 1401 gave the ratification of the legislature to the adoption by the common law of the canonist's treatment of that offence.[11]

Looking at the conception of felony as a whole we shall see that the common law is gradually evolving doctrines of criminal liability. The abolition of the presentment of Englishry destroyed the old meaning of the term "murdrum;"[12] and "murder" becomes gradually the name for the worst kind of felonious homicide, to be distinguished from homicide which is se defendendo, or accidental, or justifiable.[13] The mental element in larceny had been prominent since Bracton's day;[14] but, as we

[1] Below 558-559.
[2] E.g. 3 Henry V. st. 1 c. 1.
[3] E.g. 11 Edward III. c. 1; 27 Edward III. st. 2 c. 3, modified by 38 Edward III. st. 1 c. 6.
[4] Below 457-459. E.g. 28 Henry VI. c. 3; by this statute taking goods under colour of distress in Wales and Lancashire was made felony.
[5] 37 Edward III. c. 19.
[6] 5 Henry IV. c. 5.
[7] 8 Henry VI. c. 12.
[8] 18 Henry VI. c. 19.
[9] 33 Henry VI. c. 1.
[10] 5 Henry IV. c. 4; Reeves, H.E.L. ii 504; cp. Select Cases in Chancery (S.S.) 127-128 for a bill of 1422-1426 in which an alchemist complains that he has been arrested for non-payment of bonds got by duress, and that his elixir and other instruments of his art have been detained.
[11] 2 Henry IV. c. 15; vol. i 616-617.
[12] 14 Edward III. st. 1 c. 4; vol. i 11, 15; vol. iii 314-315.
[13] Reeves, H.E.L. ii 416, 417; vol. iii 312-315.
[14] Above 259 n. 3.

shall see, the common law doctrine of possession, and the differences between the law of real and personal property, are the causes of its peculiarly restricted definition in English law.[1] The other typical felonies, such as rape, burglary, arson, or robbery, are all obviously intentional acts of the kind which excite moral indignation.[2] No doubt the list of felonies is added to, and no doubt the old felonies are extended upon technical and political as well as upon moral grounds. Then, as now, it is not only the "mens rea," but also legal logic and public policy which is at the bottom of our doctrines of criminal liability.[3] The law has left far behind the old rules which look merely at the act and neglect the intent;[4] but it has not therefore swallowed whole the canonist's theory that moral guilt should be chiefly regarded.[5] A formed intent not manifested by any overt act, even a frustrated attempt, will not amount to a felony.[6] The speculations of Bracton drawn from the canon law have not borne much fruit. "Native rationalism without a formula"—to borrow a phrase from Lord Morley—working through the agency of statutes and decided cases, is the force which is laying the foundations of our criminal law.

Under the degree of felony many offences were created or more firmly prohibited. Here again we meet with many offences against the existing laws as to trade, such as forestalling,[7] regrating,[8] unlawful combinations,[9] and the unlawful disturbance of bargains.[10] Here again the perversion of legal process and the growing lawlessness of the times are illustrated by the number and elaboration of the statutes dealing with such subjects as maintenance,[11] champerty,[11] the forgery of deeds,[12] the

[1] Vol. iii 362-363, 367-368.

[2] See e.g. Y.B. 6 Ed. IV. Mich. pl. 18, *Fairfax* says, "Felony est de malice prepence et quant il suit encountre son volunte ceo ne suit animo felonico, etc., mes si un coupe ses herbes et les bowes chient sur un home et luy ledent en ceo cas il avera action de trespas."

[3] Holmes, Common Law 38, "While the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated."

[4] Above 51-52.

[5] Above 258-259.

[6] In Y.B. 13 Hy. IV. Mich. pl. 20 a mere intent to rob was said to be felonious, and cp. above 450 n. 11 as to a similar dictum in the case of treason; but cp. Y.B. 9 Ed. IV. Trin. pl. 24, and vol. iii 373.

[7] 25 Edward III. st. 3 c. 3; 2 Richard II. st. 1 c. 2.

[8] 27 Edward III. st. 1 c. 3.

[9] 3 Henry VI. c. 11 (confederacies by masons).

[10] 35 Edward III. 1 c. 1 (as to the herring trade).

[11] Above 300; 1 Edward III. st. 2 c. 14; 4 Edward III. c. 11; 20 Edward III. c. 4; 1 Richard II. c. 4; 7 Richard II. c. 15; vol. iii 394-400.

[12] 1 Henry V. c. 3.

giving of liveries,[1] coming armed before the justices,[2] riding armed,[3] forcible entries,[4] riots,[5] usurpations of jurisdiction by the councils of lords and ladies.[6] Class distinctions were preserved by the enforcement of the law as to "scandalum magnatum"—an offence which had been created in 1275.[7] From Edward III.'s reign onwards the Statutes of Labourers provided a plentiful crop of new offences.[8]

These statutes show us that the boundary line between criminal and civil liability is as yet uncertain. The judges, it is true, can lay down certain differences between civil and criminal proceedings—a private person cannot sue civilly unless he can show a special grievance, whereas the king can lay the charge generally;[9] a suit by a private person sounds in damages, whereas a suit by the king ends in the punishment of the guilty party.[10] But we see that many offences the commission of which would in our times be repressed by a criminal prosecution were then remedied by either civil or criminal proceedings, and sometimes only by civil proceedings. Thus a favourite expedient was to give an action of debt for double or treble damages, or an action of trespass.[11] The reason for this it is not difficult to find. There was, as we have seen, no organized police force in those days, nor were there armies of inspectors of different kinds. Except in the central courts, the administration of justice was in the hands of amateurs whose purity and impartiality were in many cases justly open to suspicion. Seeing that the criminal appeals were falling into disuse,[12] it was necessary to enlist the injured man in the cause of law and order by holding out the prospect of obtaining heavy damages, or of using the speedy process available in the action of trespass. The extensive use which the legislature made of the action of trespass is probably one of the causes of its rapid growth at the expense of other forms of action during this period. It has become the favourite

[1] 1 Edward III. st. 2 c. 14; 1 Richard II. c. 7; 16 Richard II. c. 4; 20 Richard II. c. 2; 1 Henry IV. c. 7; 7 Henry IV. c. 14; 13 Henry IV. c. 3; 8 Henry VI. c. 4; 8 Edward IV. c. 2; for a good summary see Plummer, Fortescue 27, 28.

[2] 2 Edward III. c. 3.

[3] 7 Richard II. c. 13.

[4] 5 Richard II. st. 1 c. 7; 15 Richard II. c. 2; 4 Henry IV. c. 8; 8 Henry VI. c. 9.

[5] 17 Richard II. c. 8.

[6] 15 Richard II. c. 12; 16 Richard II. c. 2.

[7] 3 Edward I. c. 34; 2 Richard II. st. 1 c. 5; 12 Richard II. c. 11; for these statutes see vol. iii 409-410.

[8] Below 459-464.

[9] Y.B. 2, 3 Ed. II. (S.S.) 120.

[10] Y.B. 13, 14 Ed. III. (R.S.) 64.

[11] E.g. 9 Edward III. c. 1 (merchant strangers); 1 Richard II. c. 3 (purveyors); 7 Richard II. c. 4 (forests); 2 Henry IV. c. 11 (those wrongly sued in the court of Admiralty); 8 Henry VI. c. 9 (forcible entries); 27 Henry VI. c. 2 (offences against the staple); 28 Henry VI. c. 4 (offences of custom house officers).

[12] Above 360-361.

remedy provided by the legislature for those whose cause of action is on the borderland between crime and tort.[1]

When we look at these personal actions of the later mediæval period the familiar distinctions between crime, tort, and contract seem to be obliterated; and the law seems hopelessly confused. There is neither a strict adherence to the scope of the old forms of action, and to the principles involved therein, nor have the principles of the substantive law freed themselves from all dependence upon these forms of action. In fact, we can trace two tendencies. (i) The scope of the older personal actions is being enlarged, and in many cases they can be used convertibly. (ii) Such actions as trespass and deceit are being so expanded that they are covering the ground formerly occupied by the older actions. Both these changes led to considerable modifications in the law.

(i) We shall see that expansions of the action of Detinue sur bailement, and the rise of Detinue sur trover led to considerable modifications in the law as to the ownership and possession of chattels.[2] The action of Debt was not only used by the legislator to repress wrongdoing;[3] it was also used to enforce executed contracts, certain contracts under seal where the defendant was obliged to pay a sum certain, and duties of very various kinds which in later law were classified as quasi-contractual.[4] The extensive use made of it shows the need for some general form of action to enforce the contractual and other duties to which a more complex ordering of society was giving rise. In the action of Account we see little expansion; and the inadequate remedy given by this action was the chief reason why the common law lost jurisdiction over such matters.[5] The expansions of the other personal actions caused them in many cases to overlap. The plaintiff was not compelled to choose at his peril the right kind of action. The facts of his case were

[1] See e.g. R.P. ii 16 (2 Ed. III. no. 10), a special writ of trespass is ordered to be formed to meet a case of imprisonment and banishment from the city by the chancellor of the University of Oxford.

[2] Vol. iii 324-328, 347-350.

[3] Above 366-367.

[4] Fitz., Ab. *Dette*, illustrates the variety of cases in which debt was brought—pl. 4 on a sealed tally; pl. 8, 131, 159 on a promise to pay a sum if the plaintiff married the defendant's daughter; pl. 10 for rent due on a lease; pl. 28, 155 for a penalty; pl. 34 hire of an archer; pl. 48 contract of sale; pl. 124 for damages recovered in a writ of waste; pl. 86 for a corody; pl. 87 on a covenant for a sum promised if a bell is not properly repaired; pl. 156 for the reasonable part of wife and children; the growing connection of debt with contract is illustrated by Y.B. 43 Ed. III. Hil. pl. 5—Belknappe argued unsuccessfully that the action did not lie because, "per le matter monstre il n'ad nul contract ou covenant entre eux;" cp. Y.B. 7 Hy. VI. Mich. pl. 7 for a similar statement by an apprentice; as we have seen (above 368) debt was never regarded as founded on a contract.

[5] Vol. iii 426-427.

often such that he could elect between Debt, Detinue, Account, and some form of Trespass.[1]

(ii) These expansions of the old forms of action were not sufficient to meet the demands of a changing condition of society for an expanding body of substantive law and for the development of legal doctrine. Fortunately in the actions of Trespass and Deceit and their offshoots new and elastic forms of action were found, which gave large facilities for this necessary expansion and development. One or other of the branches of these actions was beginning to absorb all, and more than all, of the ground covered by the older forms of personal action. The possibility of expansion in the substantive law thus secured may perhaps be underestimated by those who consider that the restrictions even of the action of trespass and its offshoots unduly hamper the development of the law.[2] We shall be in no danger of such an underestimate if we look at the law from the point of view, not of the nineteenth, but of the fifteenth century. Just as in Roman law the Lex Aquilia seemed, by comparison with the former law, to be a very general law, and yet was but a starting-point for further expansion at the hands of the prætor ;[3] so trespass and trespass on the case were general remedies compared with the older forms of action, and yet in time came to be all too narrow to give effect to the larger views of civil liability which had become coherent because of the development of legal doctrine rendered possible by their means. But the developments of the actions of trespass and case were destined to be more extensive, and more far-reaching in their effects upon the fabric of the common law, than were the developments of the Lex Aquilia upon the fabric of the civil law. The Lex Aquilia as interpreted by the prætor generalized almost exclusively the

[1] Y.B. 7 Hy. VI. Mich. pl. 7, *Paston*, J., "Briefe de Trespass gist a ce cas ergo briefe de Debte ne gist, hoc male arguitur; car d'un meme on avera briefe d'Accompte et briefe de Debte;" Y.B. 6 Hy. VII. Mich. pl. 4, in the case of goods wrongfully taken, "on poit devester le proprieté hors de luy s'il voille per proceder de action de Trespass ou demander propertie per Replevin ou briefe de detinue, et issint doncques s'il soit a son pleasure;" and a similar rule on this point had been laid down by Bereford, C.J., as early as 1312-1313, Y.B. 6 Ed. II. (S.S.) 143, 147, 149; Y.B. 20 Hy. VII. Mich. pl. 18, *Frowicke*, C.J. (dissenting) says, "Si jeo deliver argent a un a deliver oultre a mon atturney . . . et il ce deliver a mon adversary; in ce cas ce delivre est un grand damage a moy que le non delivery; et uncore Debte gist vers le bailee; mes nient obstant que Debte gist uncore Accion sur le cas gist pur le misdemeanour: . . . et ou jeo suis oblige sur condicion de paier un moindre summe, et jeo deliver le moindre summe a mon servant de ce paier, et il ne paye, in cest cas gist Det ou Accompte pur le non payment: mes pur ce que per le non paiement j'ay forfait mon obligation pur ceo j'ay grand tort pur quel j'aurai Action sur le cas;" see Core's Case (1537) Dyer 20a.

[2] Holmes, Common Law 78, "Discussions of legislative principle have been darkened by arguments on the limits between trespass and case, or on the scope of a general issue. In place of a theory of tort, we have a theory of trespass."

[3] Grueber, Lex Aquilia 1-3, 185-196.

law as to damage to property. The influence of the actions of trespass and case came to be felt in many different branches of the law, and gave an opportunity for the development of bodies of legal doctrine upon many diverse topics. (*a*) They afforded an opportunity for the growth of new ideas of delictual liability, which distinguished upon reasonable grounds of morality, expediency, or policy between cases of damnum sine and damnum cum injuria;[1] and thus through them was built up our modern law of tort, the business of which it is "to fix the dividing lines between those cases in which a man is liable for harm which he has done and those in which he is not."[2] (*b*) In one of the developments of trespass on the case—the action of assumpsit—a remedy was found which gave effect to an improved and enlarged mode of enforcing contracts; and in the end, through its working, a wholly new conception and a wholly new test of the enforceability of contracts was evolved.[3] (*c*) By their means effect could be given to the new ideas as to the distinction between ownership and possession which, as we shall see, were beginning to prevail at the end of this period.[4] (*d*) We shall see that, at the end of this period, they have made some encroachments upon the domain of the real actions.[5]

All these changes were beginning to appear in this period; but they were only beginning. Their final results upon the fabric of the common law will only gradually be worked out in the following centuries.[6] In the meantime the law is in a confused state, halting between ideas old and new. Old ideas still hold their own in the minds of conservative judges,[7] and retain their place in the law. The new ideas are gradually making themselves felt, and, at the end of this period, have gained a definite advantage; because, as I have said, the new needs of a changing society were imperiously demanding new legal doctrines, and because the competition of the chancellor was beginning to awaken even the most conservative common lawyer to the necessity of endeavouring to meet these demands.[8] "Ubi

[1] Vol. iii 381-382. [2] Holmes, Common Law 79.
[3] Vol. iii 429-453. [4] Ibid 349-350, 358-359. [5] Ibid 27-29.
[6] So too Grueber says as to the Lex Aquilia (op. cit. 195, 196), "The actions based on the Lex Aquilia . . . superseded the actions of the xii Tables, although the latter were never formally abolished. In consequence of this development, the Lex Aquilia, not by the effect of its actual terms, but as it was interpreted by the later jurists, is really the only source of the law of damage to property."
[7] We may take as illustrations the saying of *Brian*, Y.B. 6 Hy. VII. Mich. pl. 4, affirming the old law that the property in goods taken wrongfully will pass, "car a mon entent cesty de qui les biens sont pris ne poit avoir action de detinue;" and Fitz., Ab. *Barre* pl. 290 (cited Holmes, Common Law 22), "Nota per Candish, J., que si mon cheyne tue vostre brebits et jeo freschment apres le fait vous tende le cheyne vous estes sans recours vers moye"—the reference given is to Y.B. 7 Ed. III. Pasch. 66 (?). As to Brian's dictum see vol. iii 325 n. 1.
[8] Above 407; below 482, 595-596; vol. i 456.

remedium ibi jus" had been the point of view of the older law: it is beginning to give place to the modern point of view, "Ubi jus ibi remedium." "If a man is damaged," said Littleton in Edward IV.'s reign, "it is reasonable that he be recompensed."[1]

(3) Abuses of legal forms.

The age, as I have said, was litigious; and it showed its litigiousness not only in the pertinacity with which suits were conducted, but also in the astonishing ingenuity with which the forms of law were perverted. "Legal chicane," says Mr. Plummer, "was one of the most regular weapons of offence and defence, and to trump up charges, however frivolous, against an adversary, one of the most effectual means of parrying inconvenient charges against oneself. . . . Forgery of documents seems to have been common; and when statutes were passed against this practice advantage was taken of these statutes to throw suspicion on genuine title deeds."[2] Evasions of modern statutes, such as the Gaming Acts or the Companies Acts, may perhaps afford a slight parallel—but they are poor things compared with the wonderful fertility of invention displayed by the mediæval suitor and official. We might perhaps suspect the detailed plaints of petitioners to Parliament and the council of too much colour, were they not borne out by the words of the Statute Book.[3] I shall first give some instances from the statutes of the manner in which the law was perverted, and then I shall cite some out of the many petitions which illustrate the pertinacious litigiousness which rendered such legislation necessary. Some of these statutes show that the officers of justice lent themselves to the perversion of the law. A statute of 1327 recites that sheriffs, gaolers, and keepers of prisons torture prisoners to compel them to become approvers and to accuse innocent people, that they may hold to ransom such accused persons.[4] This statute and other authorities make it clear that the appeal of felony was still used as a mode of extorting money.[5] A statute of 1363-1364 suggests that the fines inflicted upon prisoners and their pledges were sometimes arbitrarily increased.[6] In 1385 it

[1] Y.B. 6 Ed. IV. Mich. pl. 18.

[2] Plummer, Fortescue 31, and authorities there cited; Winfield, History of Conspiracy 4-15; Mr. Baildon has estimated that between the years 1340 and 1380 the number of cases before the court of Common Pleas had nearly doubled, Black Books of Lincoln's Inn iv 297, 298.

[3] Some of these petitions were no doubt rather plausible than true, as we can see when we get the original petition and the answer, see e.g. R.P. ii 192 (21 Ed. III. nos. 72, 73); ibid iii 168, 169; ibid vi 135 seqq.

[4] 1 Edward III. st. 1 c. 7; R.P. ii 354 (50 Ed. III. no. 181).

[5] Paston Letters i 265.

[6] 38 Edward III. st. 1 c. 3.

was found necessary to inflict penalties on judges and clerks who deliberately made false entries on the rolls.[1] In 1461 it is stated that sheriffs, under-sheriffs, their clerks, bailiffs, and ministers indict innocent persons at their tourns simply in order to collect "fines, ransoms, and amerciaments."[2] The statement that an item, "pro amicitia vicecomitis," was a regular charge in attorneys' bills is by no means incredible.[3] The litigants themselves resorted to ingenious expedients to have their case tried before a favourable tribunal. Thus they would allege that the sheriff, lord, or mayor of the city before whom the action should have come was party to the action, so that the case might be removed.[4] In 1419 a statute was directed against a practice of certain persons in the county of Lancaster who made accusations of treasons and felonies committed at non-existing places in that county.[5] In 1427 another statute was directed against the practice of hiring jurors to find true bills against persons in the court of King's Bench.[6] The persons so indicted knew nothing of the proceedings, but they were ordered to appear in two or four days; and if they did not come their goods were forfeit. Sometimes use was made of the rival jurisdiction of the ecclesiastical courts. Those who had indicted persons for criminal offences might find themselves accused in these courts of defamation.[7]

The petitions to Parliament tell the same tale in greater detail. The clerks of the courts act as attorneys for the parties and falsify the rolls in the interests of their clients.[8] The action of conspiracy is used against a presenting jury.[9] Ministers of the crown give orders to the sheriff as to the panel of jurors to be summoned[10]—John Paston said that royal letters to a sheriff to make up a panel to acquit could be had for 6s. 8d.[11] It is not surprising to find that the court was properly suspicious of jurors. The fact that they had appeared from a long distance at the first summons, or the fact that they stayed in the place where the case was proceeding for six weeks without visible means of support, was sufficient to

[1] 8 Richard II. c. 4; R.P. iii 164 (7 Rich. II. no. 57).
[2] 1 Edward IV. c. 2. [3] Amos, Fortescue, De Laudibus 81.
[4] 9 Henry IV. c. 5; 11 Henry VI. c. 2; R.P. iv. 68 (3 Hy. V. no. 12); ibid 119 (7 Hy. V. no. 14). Another dodge was to plead foreign pleas in places where the defendant had friends, R.P. v 102 (23 Hy. VI. no. 43).
[5] 9 Henry V. c. 1.
[6] 6 Henry VI. c. 1; for similar complaints see R.P. iv. 353 (8 Hy. VI. no. 50); ibid ii 266 (29 Ed. III. no. 23). See 33 Henry VI. c. 6 for a tale of an organized conspiracy to vex the abbot of Fountains by a multiplicity of actions.
[7] 1 Richard II. c. 13; for a fraudulent use of the process of excommunication see Y.B. 20 Ed. III. (R.S.) ii 155-156; vol. iii 410-411.
[8] R.P. iii 306 (16 Rich. II. no. 28).
[9] Ibid 306 (16 Rich. II. no. 26); cp. ibid ii 31 (4 Ed. III. no. 4).
[10] Ibid ii 312 (46 Ed. III. no. 26). [11] Paston Letters i 92.

lead the court to make enquiry into the mode of summons and to refuse to take the inquest by their means.[1] In spite of statutes, writs which delayed justice by interfering with process, protections, and pardons were easily got and often used.[2] A defendant, if sued, would put in a defence, and also make protestation that the plaintiff was his villein. This protestation being entered on the record might be dangerous to the plaintiff.[3] A petition of 1445[4] explains a very ingenious device of a debtor to escape from prison. One Janycoght de Gales had been committed to prison till he paid a sum of £388 3s. 4d. which he owed to one Robert Shirbourne, draper, of the city of London. He procured an approver—George Grenelawe by name—to appeal him of larceny. This appeal, as George Grenelawe afterwards confessed, was wholly collusive. He then confessed the crime and pleaded his clergy in order that he might escape from the Fleet prison and be committed to the ordinary. Presumably he found it easy to get free from this custody. Thus the petitioner was left with no chance of getting his money.

These are but few out of many instances of similar proceedings. We cannot wonder at the strictness of the law as to maintenance, conspiracy, liveries, and champerty. The frequency and the variety of the statutes dealing with these and kindred offences illustrate at once the prevalence of the offences and the incapacity of the government to enforce the statutes. We shall be able to understand better the opportunity given for these abuses when we come to deal with the extraordinary complexity of the common law procedure revealed in the Year Books.[5]

(4) The free labourer.

The Statutes of Labourers bear witness to far-reaching economic and social changes. These changes might perhaps have proceeded more silently and have left fewer marks upon the Statute Book had it not been for the Black Death (1349),

[1] Y.B. 12, 13 Ed. III. (R.S.) 286, 298.

[2] 10 Edward III. st. 1 c. 2, 14 Edward III. st. 1 c. 15 (pardons); 2 Edward III. c. 8, 5 Edward III. c. 9, 14 Edward III. st. 1 c. 14, 25 Edward III. st. 5 c. 4, 42 Edward III. c. 3, 11 Richard II. c. 10 (writs to delay justice); 25 Edward III. st. 5 c. 19, 1 Richard II. c. 8, 13 Richard II. c. 16 (protections); cp. Y.BB. 12, 13 Ed. III. (R.S.) xcv; 13, 14 Ed. III. (R.S.) 256.

[3] R.P. iii 499 (4 Hy. IV. no. 50); Paston Letters i 225.

[4] R.P. v 106 (23 Hy. VI. no. 32); cp. for the doings of another ingenious and pertinacious litigant R.P. iv 509 (15 Hy. VI. no. 38). The statute of 1 Richard II. c. 12 shows that parties would even falsely confess themselves debtors to the king in order to delay the creditor's execution; a similar result could be attained by a collusive confession of villeinage, Y.B. 18, 19 Ed. III. (R.S.) xxxv-vi.

[5] Vol. iii 623-626.

which swept off nearly half the population. The commutation of the labour services of the villein for money rents, and the new practice of cultivating the demesne farm by hired labour, received a sudden check. Landlords could get neither tenants nor labour, and masters could not get artificers. Labourers of all kinds found themselves in a position to exact what wages they pleased. At the same time the rise of this class of free labourers presented for the first time in its modern shape the problem of the pauper—the man who cannot or will not maintain himself by his work.

The statutes of Labourers were passed to deal with this new situation. They applied to hired servants—not to tenants who held land and occupied themselves thereon.[1] It is to these laws, as developed by subsequent legislation, that we must look not only for the beginnings of the law as to master and servant, but also for the origins of ideas which in later days gave birth to the Poor Laws and the Combination Laws. The principles which underlay them were mainly four: (i) All persons coming within the statutes and able to work, must do so. (ii) They must work at a reasonable rate. Later statutes recognized that this reasonable rate could not be absolutely fixed, but must vary with the price of the necessaries of life. But both the wages of labour and the price of necessaries must be fixed at a reasonable rate.[2] (iii) A refusal to work for this reasonable wage by those who were able to do so was a criminal offence. It was also an offence to give more wages than those fixed by law; and proceedings, which, like the writ of trespass, partook both of a criminal and of a civil character, could be taken against a servant who left his master's service and against a person who enticed him away.[3] (iv) Only the impotent poor were allowed to solicit alms.

[1] Y.B. 40 Ed. III. Mich. pl. 16, *Finchden*, J., said, "Le statut fuit fait en advantage des Seigniors, que ils n'avoient pas defaut des servants; et il est necessary a chescun Seignior de lesser parcel de sa terre pur faire les services dues a son manor; et pur tant il [the defendant] est occupie en son service pur le temps, pur que plaintife ne preignes rien per vostre breve."

[2] 13 Richard II. c. 8

[3] Register ff. 189, 190, and 23 Edward III. c. 2. At common law a writ of trespass lay only if the servant was *taken* away, Y.BB. 47 Ed. III. Mich. pl. 15; 12 Rich. II. 15 *per* Thirning, J.; 11 Hy. IV. Mich. pl. 46; Lumley v. Gye (1853), 2 E. and B. at pp. 255-258 *per* Coleridge, J. As early as 1355 a writ of trespass on the Statute lay both against the servant and the enticer away, Y.B. 28 Ed. III. Mich. pl. 18; and cp. Y.BB. 47 Ed. III. Mich. pl. 15; 12 Rich. II. 37; 9 Ed. IV. Mich. pl. 4 *per* Moile, J.; F.N.B. 167, 168; probably this was a writ of trespass on the case, but whether it was trespass or case was long doubtful, Clerk and Lindsell, Torts (4th ed.) 219, 220; though the writ was originally brought on the Statute of Labourers, it has survived it, and has had an eventful history in later law, see below 463; Bk. iv Pt. I. c. 1. This history illustrates both the tendency of trespass to develop offshoots which become independent

The statutes themselves were numerous and detailed.[1] They enumerated many different kinds of labour, and many different kinds of workmen—shoemakers, carpenters, tilers, masons, carriers, and, by later statutes,[2] even chaplains.[3] Some of these later statutes drew distinctions between servants, labourers, and artificers, and subjected these different classes to different rules. Servants and labourers, for instance, were forbidden to wander from the place where they were employed without permission, while there was no such prohibition in the case of artificers[4] or chaplains.[5] But though the details vary, we see running through all these statutes the four ideas which I have indicated. In fact, they represent a serious attempt to deal with a social problem which had not arisen under the older order of society, split up as it was into more or less self-sufficing local units and ruled by the various yet similar customs of those units.[6] The old order was rapidly melting away before new economic conditions. The state must legislate for the new order, since the customs and by-laws of manors, boroughs, and gilds would no longer suffice. The legislators of the fourteenth century aimed at obtaining the same results as those attained by the old customs and by-laws. These old customs and by-laws treated the relationship of master and servant as a status, and regulated it accordingly. The legislators of the fourteenth century recognized that the relationship had then come to be created by contract. But the conditions which they prescribed for the formation of the contract, and the manner in which they defined the rights and duties of the parties to it, showed that they intended that the relationship should preserve some of the characteristics of a status. This fact is clearly shown both by the provisions of the statutes

forms of action (above 456), and the tendency in this period to develop the civil rather than the criminal side of these older remedies, which had both a civil and a criminal character, vol. iii 317-318.

[1] An ordinance made 23 Edward III.; 25 Edward III. st. 2; 31 Edward III. st. 1 c. 6; 34 Edward III. cc. 9-11; 36 Edward III. cc. 8, 14; 42 Edward III. c. 6; 2 Richard II. c. 8; 7 Richard II. c. 5; 12 Richard II. cc. 3-5, 7, 9; 13 Richard II. c. 8; 4 Henry IV. c. 14; 7 Henry IV. c. 17; 2 Henry V. st. 2 c. 2; 2 Henry VI. c. 18; 6 Henry VI. c. 3; 8 Henry VI. c. 8; 23 Henry VI. c. 12.

[2] 36 Edward III. st. 1 c. 8; 2 Henry V. st. 2 c. 2.

[3] On this subject see Putnam, Wage Laws for Priests after the Black Death, Ann. Hist. Rev. xxi 1; they were not directly dealt with in 1349 but the ecclesiastical authorities were directed to deal with them; for the measures which they took to carry out the ordinance see ibid 18-27.

[4] Reeves, H.E.L. ii 455; 12 Richard II. c. 3.

[5] Y.BB. 50 Ed. III. Trin. pl. 3; 4 Hy. IV. Mich. pl. 7; 10 Hy. VI. Mich. pl. 30; but on the question whether chaplains could be compelled to serve there had been some conflict of opinion, Putnam, Wage Laws for Priests 27-28; The Enforcement of the Statute of Labourers 179-199; eventually it was held they were not.

[6] Above 378, 379, 384, 391-394.

upon these matters, and by the manner in which they were interpreted by the courts.[1]

We shall see that before the growth of the action of assumpsit the common law had no action to enforce a simple executory contract.[2] But, though an agreement by a workman to serve an employer was a contract, a parol retainer by an employer, which complied with the statutory requirements, was enforceable;[3] and it is possible that it was enforceable even though made by an infant.[4] To comply with these statutory requirements the retainer must be for a year or six months; and so, if an executory parol contract for a shorter term were made, it was not enforceable unless made under seal.[5] Moreover, the retainer must comply with the statutes as to rates of wages, hours of work, and even, in some cases, intervals of rest.[6] Then again, a retainer under the statutes differed from ordinary contracts in that it gave to the master remedies for breach of contract absolutely different from those available in the case of any other contract. Thus he could use force to capture a servant who departed,[7] or who, having been retained, never entered his service.[8] Further, he had, as a result of the retainer, rights against other masters who persuaded his servant to depart, or who, having unknowingly engaged his servant, did not give him up when required to do so.[9] Thus it would appear that the relation between master and servant under the statutes, though contractual in its origin and in some of its incidents, gave rise, like the marriage contract, to a status of a peculiar kind. As in the case of marriage,

[1] The best authority upon the Statutes of Labourers and their interpretation is Miss B. H. Putnam's book on The Enforcement of the Statutes of Labourers; from the point of view of the history of the law of master and servant the most valuable parts of the book are Part I. chap. ii, and Part II. chap. ii; the former deals with proceedings before the justices of Labourers, and the latter with proceedings before the central courts. In the proceedings before the justices cases turning on the receipt of wages in excess of the statutory limit are most frequent; in the proceedings before the central courts cases turning on breach of contract by the servant, or on procuring breach of contract by another are most frequent. It is gratifying to find that the learned authoress agrees with my main conclusion as to the reasonableness of this legislation, and as to its legal effect.

[2] Vol. iii 423-424.

[3] Putnam, op. cit. citing Y.BB. 41 Ed. III. Mich. pl. 4; 45 Ed. III. Mich. pl. 15.

[4] Y.B. 12 Rich. 108-110.

[5] Putnam, op. cit. 191, citing the form of writ in The Register at f. 190a; Y.B. 28 Ed. III. Mich. pl. 18; F.N.B. 168 F.

[6] Below 466; see especially 23 Henry VI. c. 12; 11 Henry VII. c. 22; 6 Henry VIII. c. 3.

[7] Putnam, op. cit. 195, citing Fitz. Ab. *Laborers* pl. 56 (Hil. 33 Ed. III.).

[8] Ibid 191, citing Y.BB. 41 Ed. III. Mich. pl. 4; 47 Ed. III. Mich. pl. 15.

[9] Ibid 195, 196, citing F.N.B. 168 C.; it would appear from the reasoning in the Y.BB. cited above 460 n. 3 that Coleridge, J., in Lumley v. Gye (1853) 2 E. and B. at pp. 244-269 was well warranted in holding that at common law, apart from the Statutes of Labourers, no action was given for procuring the breach of a contract.

the relationship was founded on contract, but the rights and duties involved in the relationship were fixed to a large extent by law and not by the agreement of the parties; and the consequences of creating the relationship might affect third persons, as well as the parties to the contract. From this point of view it is perhaps worthy of note that in *Lumley v. Gye* practically the only cases cited in support of the now general rule that an action lies for procuring a breach of contract, were (apart from contracts of service to which the statutes of Labourers applied) cases of procuring a breach of the contract of marriage.[1] No doubt, as we shall see, there was a tendency in later law to regard the contract of service purely as a contract, and consequently to regard this cause of action as an incident peculiar to such a contract.[2] But historically there was a good deal to be said for the view that, as a result of the statutes of Labourers, the common law recognized a right of action, not for procuring a breach of contract, but for disturbing a definite status, whether created or not by contract.

Probably the manner in which the judges of the fourteenth century interpreted these statutes accorded very exactly with the intentions of their framers. The legislature intended that the results of contracts of employment with free labourers should reproduce such of the incidents of the status of villeinage as could be usefully adapted to the new situation. It was felt and felt wisely that the progress from status to contract could not be made at one bound. The state must ordain what was a reasonable wage; all who could must be made to work at this reasonable wage; and those who were not amenable to civil process, because they had no estate, must be dealt with by the criminal law. That wages and prices should be fixed by free competition they would have thought a monstrous absurdity. Can we in the twentieth century, who live in an atmosphere of free competition, tempered by strikes, lock outs, and rings, say, as decisively as the economists of the middle of the nineteenth century, that the views held by the legislature in the fourteenth century were unreasonable? That its views on these matters were in fact reasonable, both for the fourteenth century and long after, can be seen from the fact that both the status of the labourer as defined

[1] Lumley v. Gye (1853) 2 E. and B. at pp. 249, 250; cp. the comparison made by Culpeper, Y.B. 11 Hy. IV. Mich. pl. 46 p. 24, between this cause of action and the writ of ravishment of ward; for this writ see vol. iii 17 n. 1; the realism of mediæval law tended to make the mediæval lawyer think that if a man or a woman occupied an inferior status with regard to another, the latter had a sort of proprietary interest in the maintenance of the status; it is clear that analogies from the position of husband and wife and guardian and ward were somewhat easily applied to the relation of master and servant under the Statute of Labourers.

[2] Bk. iv Pt. I. c. 2.

by these statutes and decisions, and many of the other provisions of these statutes, were adopted by the framers of the statute of 1562-1563,[1] which fixed the main principles of the law of employer and workmen for more than a century and a half.

(5) Classes of society.

That there were different classes of society which should be governed by different laws would have appeared a truism to the mediæval legislature. Gower well represents this point of view as he looks back to a time when

> "Justice of lawe tho was holde,
> The privilege of regalie
> Was sauf, and al the baronie
> Worschiped was in his astat;
> The citees knewen no debat,
> The people stod in obeiasance
> Under the reule of governance."[2]

The king, the peer, the knight, the yeoman, the villein, the merchant, the labourer, the artisan, the various sorts of persons in orders, all occupied definite and legally fixed places in the hierarchy of society. It might be possible—and, in fact, it was more possible in England than in any other country in Europe—to step from one class to another. There was a common law in England which for the purposes of crime, of tort, and of property, administered much the same rules to all alike. But there were many rules of law peculiar to each class; and those who belonged for the time being to any given class must conform to the laws of that class. Even at the present day, when the equality of all men and women is an accepted political fiction, we find that the law must draw distinctions between different classes and between different professions and trades. But in the Middle Ages this difference in legal rules was conceived of as depending, not upon the fact that a difference in pursuit and calling makes some deviation from the rule of similar and equal law a necessity, but rather upon the necessary and natural differences in the structure of society.[3] That the law for the employer and employed should be in all respects equal would hardly have been considered either possible or desirable in the Middle Ages. In the country we see this idea in the status of the villein.[4] In the boroughs we see it in the differences between the positions of the master, the

[1] 5 Elizabeth c. 4; Bk. iv. Pt. I. c. 2.

[2] Confessio Amantis, Prologue (ed. Macaulay); cp. Ashley, Economic History i Pt. II. 390.

[3] The difference in the modern and the mediæval standpoint upon this question is somewhat analogous to the difference which I have noted (above 403-404) between the modern and the mediæval community or association.

[4] Above 264-265; vol. iii 491-510.

journeyman, and the apprentice.[1] The statutes of Labourers applied it, as we have seen, to the changed economic conditions of the country. The free labourer was not a villein. He was exempt from many of the legal incidents of the villein status. But he took a position of his own in society; and that position must be regulated by law for the good of the community. He must work, and he must work at reasonable rates. The incidents of the status of this new class must be regulated by law in the same way as the incidents of the status of other classes were regulated. Many other statutes of this period bear witness to the same idea. A statute of 1363[2] fixed the diet and apparel of servants, and the apparel of handicraftsmen and yeomen, of gentlemen under the estate of knights, their wives and children, of merchants, of knights with lands of the yearly value of 200 marks, of knights with lands of the yearly value of 400 marks, of various sorts of clerks, and of ploughmen. We find a similar and more elaborate Act in 1463,[3] which was superseded by another Act of the same kind in 1482.[4]

It was not open to a man to follow any trade he pleased. In 1388 it was enacted that persons who had served at husbandry until the age of twelve years should not be apprenticed to any trade.[5] In 1405 it was enacted that no one should apprentice his child unless he had 20s. a year in land.[6] In 1363 it was enacted that handicraftsmen should pursue one trade only.[7] As with the artisan and the free labourer so with the other classes of society—their position was ceasing to be dependent upon the customs and by-laws of manor or borough; but the class differences remained, and, as men then thought, rightly remained. They must be preserved and regulated by Parliament when the old customs failed or were disregarded. Thus we get the striking contrast noted by Dr. Cunningham between mediæval and modern society—"The ordinary object of ambition was not so much that of rising out of one's grade, but of standing well in that grade; the citizen did not aim at being a knight, but at being warden or master of his gild, or alderman and mayor of his town;"[8] and as late as Henry VIII.'s reign this mediæval point of view was advocated as making for the peace and good order of the State.[9]

[1] For a description of their positions at this period see Cunningham, Industry and Commerce i 349-353.

[2] 37 Edward III. cc. 8-14.

[3] 3 Edward IV. c. 5.

[4] 22 Edward IV. c. 1.

[5] 12 Richard II. c. 5.

[6] 7 Henry IV. c. 17.

[7] 37 Edward III. c. 6; 2 Henry VI. c. 7.

[8] Industry and Commerce i. 464.

[9] Starkey, England in the Reign of Henry VIII. (E.E.T.S. Extra Series xii) 157-158, "But how to kepe thys body knyte togydur in unyte, provysyon wold made by

Not only the pursuits, but also the recreations, of various classes of society were matters for statutory intervention in the interests of the state. The same statute of 1363 which regulated diet and apparel made it unlawful for any persons to have a hawk unless they were "of estate to have the hawk."[1] Similarly, hunting was forbidden to those who had not a sufficient annual income from land.[2] Servants and labourers were ordered to leave playing at "hand ball or football" or "such other unthrifty games" and to practise at bows and arrows on Sundays and other festival days.[3] Rich and poor, high and low alike must help the state—by the labour of their bodies if they could not help with their counsel or their wealth. Even before the Great War a few had come nearer to the mediæval point of view than our ancestors of the last century; for, even then, there were some who dreamt of a state of society in which a portion of the leisure of the citizen should be devoted to exercises necessary to make him, if need be, an efficient protector of his state. In the light of recent events few can doubt that if, under the influence of politicians imbued with the doctrines of free trade and laissez-faire, the ideal of the pursuit of individual gain had not usurped this mediæval ideal of patriotism, it would have been better for England and the world; for a consistent following of this ideal of patriotism necessarily implies a preparedness to meet a national emergency which might have prevented and would certainly have shortened the Great War.

(6) Internal trade.

We have seen that in the preceding period internal trade was almost entirely regulated by various local communities.[4] Fraudulent dealing and unfair trading were forbidden; and the conditions under which trade could be carried on were regulated by the courts of fairs, by the tourn or leet, or by the borough courts. In this period this regulation of trade tended more and more to

commyn law and authoryte that every parte may exercyse hys offyce and duty—that is to say every man in his craft and faculty to meddyl wyth such thynge as perteynyth therto, and intermeddyle not wyth other; for thys causeth much malyce envy and debate both in cyte and towne, that one man meddylyth in the craft and mystere of other. One is not content with hys owne professyon craft and maner of lyvyng, but ever, when he seyth another man rych than he, and lyve at more plesure, then he despysth hys owne faculty, and so applyth himself unto the other. Wherfor a certain payne must be ordryd and appoynted apon every man that contentyth not hymselfe wyth hys owne mystere craft and faculty; wherby much schold be restreynyd thys curyosyte, a gret ruyne and destructyon to all good and just pollycy."

[1] 37 Edward III. c. 19; cp. 34 Edward III. c. 22; Y.B. 38 Ed. III. Trin. p. 12, "Nous disons que R. de G. n'ad my terre sufficient d'aver un servant."

[2] 13 Richard II. st. 1 c. 13.

[3] 12 Richard II. c. 6; 11 Henry IV. c. 4; 17 Edward IV. c. 3 made the prohibition general.

[4] Above 391.

be carried out by the justices of the peace and the gilds under the supervision of the legislature. As with the regulation of classes of society, so with the regulation of internal trade, Parliament to some extent superseded the older communities, and carried on their work upon similar lines. Social and economic progress necessitated a great increase in the activity of Parliament, and a corresponding decrease in the activity of the older bodies.[1]

About some matters there had been general rules from the earliest times. Coinage, weights, and measures must be regulated by the legislature wherever there is trade.[2] Good roads were almost non-existent, and therefore the maintenance of a free passage by river was a matter of the first importance. From Magna Carta onwards, numerous statutes provided for the removal of weirs and other obstacles to navigation.[3] As I am not writing an economic history I cannot enter into the details of these statutes. Nor shall I even attempt to enumerate the many statutes which in one way or another regulated trade. It will be sufficient to say that we find statutes directed against forestalling and regrating, against the disturbance of bargains, against confederacies to raise the price of goods, against unreasonable gild ordinances passed with a view of securing a monopoly of trade,[4] against paying workmen in any other than current coin.[5] In addition, many statutes were passed either to regulate the prices to be charged for various commodities or to ensure the honest manufacture of such commodities. Thus, we find statutes dealing with the trades of victuallers,[6] fishermen,[7] wool, silk, wôrsted, and broadcloth manufacturers,[8] chandlers,[9] shoemakers,[10] bowyers,[11] tilers,[12] fullers,[13] horners.[14]

Some of these statutes touch modern problems; but they do not deal with them in a modern spirit. The statutes which dealt with the disturbing of bargains and with confederacies repressed such practices only with respect to particular trades. Their makers were not troubled with questions of the proper limitations

[1] A good illustration is 12 Richard II. c. 13 for the prevention of nuisances in towns; this was a matter which was formerly dealt with wholly by local by-laws, above 391; cp. 6 Henry VI. c. 5, 8 Henry VI. c. 3, 23 Henry VI. c. 8, 12 Edward IV. c. 6, which regulate sewers; cp. Tout, Edward II. 240-241.

[2] 14 Edward III. st. 1 c. 12; 34 Edward III. cc. 5, 6; 15 Richard II. c. 4; Plummer, Fortescue 316-318; Reeves, H.E.L. ii 281, 522.

[3] 25 Edward III. st. 3 c. 4; 45 Edward III. c. 2; 1 Henry IV. c. 12; 4 Henry IV. c. 11; 9 Henry VI. c. 9; 12 Edward IV. c. 7.

[4] 15 Henry VI. c. 6.

[5] 4 Edward IV. c. 1.

[6] 31 Edward III. c. 10; 12 Edward IV. c. 8.

[7] 35 Edward III. c. 1.

[8] 33 Henry VI. c. 5; 7 Edward IV. c. 1; 8 Edward IV. c. 1.

[9] 11 Henry VI. c. 12.

[10] 4 Edward IV. c. 7.

[11] 12 Edward IV. c. 1.

[12] 17 Edward IV. cc. 4, 5.

[13] 22 Edward IV. c. 5.

[14] 4 Edward IV. c. 8.

of state control in such matters. They had no doubt that the law should repress such practices if they were harmful to the community; and they repressed them when they appeared, without troubling to make a more general rule. In this, as in many other respects, some of the conceptions which underlie these statutes are quite different from those of our own day. We pass statutes to ensure honest manufacture in the interest of the consumer, and healthy conditions of work in the interests of both workman and consumer. But in other respects we leave buyer and seller to settle matters their own way. We consider that competition should settle prices and other conditions of trade; and that a case must be made out for legislative interference with the rule of free competition. In the Middle Ages it was thought that the law ought to intervene to secure not only a commodity honestly manufactured, but also a fair and reasonable price, an adequate amount of skill in the producer,[1] and a fair treatment of the labourers engaged in production.[2] Most of our modern problems arise from an entirely different economic theory as to the proper limits of legislative interference. The burden of proof in mediæval times was upon those who denied the right of the state to interfere in such matters: in modern times it is upon those who assert such a right.[3] This difference in economic theory arises from the very different ideal which the mediæval as compared with the modern state set itself to realize.

The ideal aimed at by mediæval state was a moral ideal—honest manufacture, a just price, a fair wage, a reasonable profit. Commerce and industry, as it has been said, were regarded as a series of relations between persons, not as a mere exchange of commodities.[4] The acceptance of this moral ideal naturally led men to think that modes of manufacture, prices, wages, and

[1] "If a man takes upon him a public employment," said Holt, E.J., "he is bound to serve the public as far as the employment extends," Lane v. Cotton (1701) 1 Ld. Raym. at p. 654; cp. Y.B. 21 Hy. VI. Pasch. pl. 12 *per* Paston, J.; as Holmes says (Common Law 203), these doctrines "formed part of a consistent scheme for holding those who followed useful callings up to the mark."

[2] See 22 Edward IV. c. 5—against the use of fulling mills to make caps, which threw men out of work, and did not do the work so well.

[3] See Y.B. 2 Hy. V. Pasch. pl. 26 for the large powers *Hull*, J., thought he could exercise when a contract for a very moderate restraint of trade was before the court: "A ma intent," he said, "vous purrez aver demurre sur luy que l'obligation est voide eo quod le condition est encountre common ley, et per Dieu, si le pl' fuit ici il irra a prison tanque il ust fait fine au Roy;" the restraint in this case was only for half a year, and in Ward v. Bryne (1839) 5 M. and. W. at p. 562, Parke, B., cited it to prove that an absolute restraint of trade limited only as to time was illegal.

[4] Cunningham, op. cit. i 465, 466, "So long as economic dealings were based on a system of personal relationships they all had an implied moral character. To supply a bad article was morally wrong, to demand excessive payment for goods or for labour was extortion, and the right or wrong of every transaction was easily understood; but when all dealings are considered as so many instances of exchange in an open market the case is different."

profits could be and ought to be definitely fixed by reference to the definite and fixed standard of right and wrong by which all human actions must be measured. Just as the nation as a whole was divided into distinct classes, naturally separate, each having its own duties in that state of life to which it had pleased God to call it, so the commercial and industrial relations of these classes must be regulated in such a way that these duties could be performed. It would be impossible that these duties should be performed if any one person or any one class could take advantage of fortuitous circumstances to advance his or their interest at the expense of the rest of the community.[1] Labourers must not combine to raise wages above the fair rate. Those who sold provisions must not take advantage of a time of scarcity to raise prices—still less must they produce an artificial scarcity by forestalling and regrating. Those who manufactured goods must manufacture honestly, and by the accustomed methods. Those who had money must not take unfair advantage of the needs of those who had none to charge interest. It was an ideal which was in harmony with the prevailing tone of mediæval thought and aspiration.[2] It appeared to be feasible when commerce and industry consisted for the most part of dealings between men who were members of small neighbouring communities, and when the ordering of commerce and industry was to a large extent in the hands of those communities.[3]

In our own day the courts have been faced with new industrial conditions. They have been obliged by a process of present reasoning upon old cases to deduce rules of law to regulate these conditions; and they have been embarrassed by the dearth of authority upon such subjects in the older cases.[4] These new conditions have been created by the new liberty accorded both to employers and employed to act as they please in furtherance of what they consider to be their interests. The old law was founded upon the view that it was for the state to regulate the

[1] As Mr. Leadam points out, Select Cases in the Star Chamber (S.S.) ii xxxix, it was laid down by Thomas Aquinas that "quod perfecta civitas moderate mercatoribus utatur," and that the merchants' calling was only lawful, "Ubi quis intendit ad lucrum non quidem ut finem ultimum laboris, sed tanquam finem necessarium ad sui et suæ familiæ sustentationem, aut tanquam honestum, etsi non semper simpliciter necessarium;" so also "justum pretium" is to be determined by "communis æstimatio," i.e. by public authority; 23 Edward III. c. 6 (cited by Leadam, loc. cit.) embodies this doctrine of just price—"All sellers of all manner of victual shall be bound to sell the same victual for a reasonable price, having respect to the price that the said victual be sold at in the places adjoining, so that the same sellers have moderate gains and not excessive, reasonably to be required according to the distance of the place from whence the said victuals be carried."

[2] Above 122, 131-132.

[3] Ashley, Economic History Pt. II. 7-9, 29.

[4] Stephen, H.C.L. iii 209, 210, 223, 224; Wright, Conspiracies 15-18.

conditions of trade. All the mediæval statutes dealing with commercial matters rest upon this basis. We do not find, it is true, general statements that certain specific acts, such as a combination to raise wages or otherwise to restrict trade, are wrongful. But, "the clearer a thing is," it was once said by James, L.J., "the more difficult it is to find any express authority or any dictum exactly to the point;"[1] and, to the mediæval mind, the view that the law could punish any departure from the ordinary conditions and modes of trading would have seemed self-evident.[2] Again, we in modern times distinguish conduct which is so unlawful that it is treated as a crime, conduct which is not criminal but which will give rise to a civil action for damages, and conduct which will give rise neither to a criminal prosecution nor to a civil action, but which is so disapproved by the law that any contract relating to it is held to be illegal and void. It would hardly have been possible to draw these distinctions in the Middle Ages. We have seen that a judge in Henry V.'s reign seemed to think that to make a contract in restraint of trade was almost a crime;[3] and whether a departure from the ordinary modes and conditions of trading should be treated as a crime or a tort, the mediæval lawyer or legislator would probably not have stopped to enquire. As we have seen, the two things shade off into one another at this period. But there is no doubt that the judges would have taken measures to stop such a departure; and probably the active mediæval Parliament would have passed a statute to give an action of trespass to the party aggrieved. Some of these ideas were embodied in the Combination Laws; and there was perhaps some warrant for holding, when these laws were repealed, that there was still a common law rule which made conspiracies in restraint of trade illegal.[4] The lawyers' ideas as to what is legal and what is illegal "at common law" are naturally coloured by ideas as to public policy which are constantly and

[1] (1875) 10 Ch. App. at p. 526.

[2] This seems to be the view taken by Erle, Trade Unions 5-11, 25; see below n. 4.

[3] Above 468 n. 3.

[4] But see Wright, Conspiracies 1-18; Stephen, H.C.L. iii 210, 214, 226, 227; he says at p. 210, "Sir W. Erle observes that whilst the ancient statutes were in force they tended to prevent a resort to the common law remedy for conspiracy. The inference from the existence of the statutes appears to me to be that until they were passed the conduct which they punish was not criminal;" but perhaps this argument is not so decisive as it would be if applied to the law of a later date. When the regulation of trade became a national rather than a municipal affair, the common law took over many of those paternal notions which prevailed in the older local courts; and we cannot regard the absence of a remedy in the common law courts for certain acts as decisive of the legality of the act. There was no remedy for the breach of an executory simple contract provided by those courts—could it therefore be said that breach of contract was a lawful act?

repeatedly expressed in statutes;[1] and though before the statutes of Labourers the common law probably had no adequate remedies to meet the abuses at which the statutes aimed,[2] it does not follow that the acts which they repressed would have been regarded as quite legal. On the contrary, they were probably from the first regarded as new abuses which the arm of the law must be strengthened to repress. However that may be, it is not surprising that after centuries of such legislation as the statutes of Labourers and the Combination Laws the lawyers should suppose that there existed a set of common law principles which made any kind of conspiracy in restraint of trade a criminal offence. Whether this explanation is correct or not, it will be clear that the view taken by the mediæval state as to the proper relationship of the law to trade was so different from the view of the modern state that we cannot expect to find much mediæval authority upon the legal problems of our own times.

(7) External trade.

The numerous statutes dealing with this subject fall within the province of the economic historian even more exclusively than those relating to internal trade. We may note that up to the end of the reign of Edward III. the statutes were passed rather in the interests of the consumer.[3] The alien was encouraged to settle and trade, in spite of the protests of the chartered boroughs.[4] At the latter end of the fourteenth century another economic theory began to prevail. Restrictions were laid upon the dealings of aliens. They were not allowed to trade in retail.[5] They must reside with certain hosts.[6] Measures were taken to prevent the export of the precious metals, and to encourage their import.[7] The native manufacturer was encouraged by the prohibition of the importation of articles already

[1] The mediæval law of sale of goods supplies an illustration—a duty was imposed on a vendor who sold articles of food to warrant their soundness, Y.B. 9 Hy. VI. Mich. pl. 37; there was no such duty imposed on the vendor of other articles, and the distinction was justified by the policy of the statutes which aimed at securing the soundness of food, Y.B. 11 Ed. IV. Trin. pl. 10 = Fitz., Ab. *Disceit* pl. 23. The House of Lords decided against this principle in Ward v. Hobbs (1878) 4 A.C. 14—though at p. 28 Lord Selborne said that a right of action in such cases would not be unreasonable.

[2] Y.BB. 47 Ed. III. Mich. pl. 15 *per* Finchden; 11 Hy. IV. Mich. pl. 46.

[3] Cunningham, Industry and Commerce i 377, 378.

[4] The allegations made against the foreigners are sometimes startling, see R.P. ii 332 (50 Ed. III. no. 58), where the commons accuse the Lombard brokers of being "Saracens and privy spies," and "ont ore tard menez deins la terre un trop horrible vice que ne fait pas a nomer;" see also ibid 74 (8 Ed. III. no. 6), the merchants of Gascony complain that London, Bristol, and other towns will not let them carry on their trade.

[5] 2 Richard II. st. 1 c. 1; 16 Richard II. c. 1. [6] 5 Henry IV. c. 9.

[7] 5 Richard II. st. 1 c. 2; 14 Richard II. c. 1; 2 Henry IV. c. 5; 4 Henry IV. c. 15; 2 Henry VI. c. 6; 17 Edward IV. c. 1.

manufactured.[1] The shipping interest was encouraged by a prohibition against importing or exporting goods in any but English ships.[2] The farmer was encouraged by the prohibition of the import of corn unless it was sold above a certain fixed price.[3] The unfair treatment of English merchants was dealt with by statutes which provided for measures of retaliation. Such statutes left a large discretion to the crown; and probably at this period it was competent to the crown to take very effectual measures without statutory authority.[4] As Dr. Cunningham says, these statutes point to the beginnings of the policy which was embodied in the Corn Laws and the Navigation Laws, and in the laws which provided for the deliberate manipulation of commerce with the object of procuring bullion.[5]

The moral ideal aimed at by the legislature in its regulation of internal trade plays but little part in the regulation of external trade. In the first place, foreigners were, if not enemies, certainly rivals. In dealing with such persons it was therefore necessary to consider not so much what was morally right, as what was for the advantage of Englishmen. Thus the root idea of the Mercantile System—the regulation of commerce with a view to the increase of the power of the state—first makes its appearance in the legislation which regulates external trade. In the second place, the local organizations which governed internal trade with a view to the realization of this moral ideal, had neither the power nor the capacity to regulate these very different transactions. For technical reasons, too, the common law was equally unable to deal with them; and so, as we have seen, most of the legal problems which arose in connection with this branch of the law did not at this period fall within the jurisdiction of the common law courts.[6] If it was a question of putting stress upon a foreign community or a foreign state to remedy injustice done to an English subject, the crown must be referred to to put in motion the engine of diplomacy, or to issue letters of

[1] 33 Henry VI. c. 5; 3 Edward IV. cc. 3, 4; 1 Richard III. c. 9; Cunningham, Industry and Commerce i 429-431. It is to be observed, however, that the statute 1 Richard III. c. 9 excepts books "wrytten or imprynted," and "any writer, lympner, bynder or imprynter;" cp. Plummer, Fortescue 318-320.

[2] 3 Richard II. st. 1 c. 3.

[3] 3 Edward IV. c. 2.

[4] E.g. 38 Edward III. st. 1 c. 11—allowing aliens to import wine, "always saved to the king that it may be lawful to him, whensoever it is advised to him or his council, to ordain of this article as best shall seem to him for the profit of him and his commons;" cp. 4 Edward IV. c. 5, providing for retaliation against the Duke of Burgundy; the Act is to endure during the king's pleasure.

[5] Industry and Commerce i 378.

[6] Above 309-310; it is asserted, 28 Ed. III. (R.P. ii 261 no. 47), that the laws and usages of the staple are wholly unknown to the commons; cp. ibid iv 191 (1 Hy. VI. no. 45).

marque or reprisal;[1] and so such questions naturally came before the council, or the court of Admiralty, which, as we have seen, was constituted to deal with some of them.[2] Beyond the bare enforcement of the statutes passed to further the political and economic views of the day, the ordinary courts had little to do with such matters. As yet there is no body of legal doctrine or principle relating to them known to English law. For the germs of such legal doctrines or principles we must look rather to the records of the council and the Admiralty than to the Statute Book and the Parliament Rolls.

(8) International relations.

The growing commercial importance of England, the need for putting some restraint upon the piratical propensity of Englishmen, and the inefficiency of the court of Admiralty,[3] added to the Statute Book some laws directed to safeguarding the interests of alien friends. In 1414[4] a comprehensive Act was passed to prevent the breach of truces made or of safe conducts granted by the king. Such offences were declared to be high treason. A new official, called a conservator, was appointed by the Act to enquire into breaches of its provisions. He was to proceed "as the admirals of the kings of England before this time reasonably, after the old custom and law on the main sea used, have done or used." In every commission to enquire there were to be associated with the conservator two men learned in the law. Masters and owners of ships, together with the number of their crew, were to be enrolled and sworn not to break truces, and, if they made any captures, to give information thereof to the conservator. Masters and owners not complying with these provisions were liable to forfeiture of the ship, fine, and imprisonment. Complaint was made in 1416[5] that this statute was so effectual that it encouraged the enemies of England "to grieve the king's faithful liege people." A machinery was therefore provided by a statute passed in that year for obtaining letters of marque. In 1435 the same reasons produced a suspension of the statute for seven years.[6] In 1450[7] the statute was revived. The chancellor and either of the chief

[1] R.P. iv 29 (2 Hy. V. no. 5)—a petition touching a debt due from the duke and commonalty of Milan to Edmund, late Earl of Kent. As the said sum "cannot be recovered by the common law of England," the executors of the earl pray for letters of marque and reprisal; cp. ibid i 293 (8 Ed. II. no. 22); ibid 457 (18 Ed. II. no. 15).

[2] Vol. i 544-545.

[3] Ibid 546.

[4] 2 Henry V. c. 6; cp. Marsden, Law and Custom of the Sea (Navy Records Soc.) i 116-117.

[5] 4 Henry V. c. 7.

[6] 14 Henry VI. c. 8.

[7] 29 Henry VI. c. 2.

justices were given the powers of a conservator. Persons appearing when summoned were not to be guilty of treason. Owners and others employed about the ship, not being parties to any offence committed by the ship, were not to be damaged by the Act. An Act of 1453[1] empowered the chancellor to make restitution to alien friends for ships and goods spoiled at sea. An Act of 1435[2] was passed to regulate the thorny subject of the goods of alien friends upon enemies' ships. The statute recited that the immunity of such goods led to fraudulent practices, and therefore allowed the captors of such ships (provided that the ships had not the king's safe conduct) to retain such goods. An Act of 1436 was passed to regulate certain abuses of some forms of safe conduct.[3] In 1439 alien friends were prohibited from loading their goods in an enemy's ship under penalty of forfeiture, unless the ship had a safe conduct.[4] It is to these statutes that we must look for the germs of that part of the law of England which is directed to the enforcement of international obligations, and the regulation of the rights of foreigners. Up till the last century it was a very meagre branch of English law; and this is due to the fact that it was a branch of law which fell outside the purview of the ordinary courts. These statutes show that in the Middle Ages it was regarded as falling within the jurisdiction of the admiral, the chancellor, or special officials. More especially it fell, as a branch of maritime law, under the jurisdiction of the admiral. As we have seen, the peculiar history of the Admiralty jurisdiction in England for a long time prevented the development of such branches of law. The common law courts impeded the jurisdiction of the Admiralty and provided no reasonable substitute.[5]

(9) Amendments of the Common Law.

The statutes which deal with the common law follow after and attend upon the development of legal doctrine. As we shall see, it is to the legal profession that the development of the doctrines of the common law is chiefly due. We can see from the Rolls of Parliament that it is the lawyers or the litigants of the day who, knowing where the shoe pinched, suggested the greater part of the statutory amendments in the law. Legislation is not, as in former periods, dictated from above. The common law courts make and develop the common law; the community of the land—lay and learned alike—occasionally assist or modify their work by amending statutes; and, as in modern times, the peculiar circumstances of a new case sometimes inspired an amending or

[1] 31 Henry VI. c. 4. [2] 14 Henry VI. c. 7. [3] 15 Henry VI. c. 3.
[4] 18 Henry VI. c. 8. [5] Vol. i 553-558.

a declaratory Act.[1] Into the details of some of these statutes I shall enter later. Here it will be sufficient to say a few very general words about their scope.

We shall see that the procedure of the common law courts was growing more and more elaborate and unreasonable.[2] Hence it is not surprising to find that statutes relating to procedure pure and simple are more numerous than any of the other statutes which deal with matters of pure law. Essoins,[3] outlawry,[4] replevin,[5] vouching to warranty,[6] process to compel appearance in personal actions,[7] process in the possessory assizes [8]—are some of the commonest topics. With the statutes relating to procedure we must place the statutes of "Jeofails" which allowed amendments of pleadings and records.[9]

Of the substantive part of the law the land law throughout this period continued to be the most important. Many legal doctrines originated in it; and, as in the days of Bracton, the law upon many other subjects was grouped around it. It was created for the most part by the labours of the lawyers; and, as the results of their labours are summed up in Littleton's Tenures, I shall speak of it when I come to deal with Littleton and his book.[10] But its great practical importance led to some statutory amendments. Fines for alienation,[11] the incidents of tenure,[12] the royal escheators,[13] the finalis concordia,[14] extensions of the statutes of mortmain to other corporations besides the religious houses [15]—are some of the most important subjects dealt with. Just as the practical importance of this branch of the law caused many legal doctrines to be regarded as adjuncts to it, so we find that it is its rules which have inspired some statutes upon topics which would seem at first sight to be far removed from it. The rule that lands were forfeited to the crown for ever in cases of treason,

[1] 25 Edward III. st. 1; 9 Henry VI. c. 11; both statutes relate to questions as to the legitimacy of children, and the facts of the cases are recited in the statutes.

[2] Below 588; vol. iii 623-626.

[3] E.g. 12 Edward II. st. 2; 9 Edward III. c. 3; Reeves, H.E.L. ii 189, 190.

[4] E.g. 5 Edward III. cc. 11, 12.

[5] E.g. 9 Edward III. st. 1 c. 2.

[6] E.g. 14 Edward III st. 1 c. 18.

[7] E.g. 18 Edward III. st. 2 c. 5; 25 Edward III. st. 5 c. 17; 7 Richard II. c. 17.

[8] E.g. 2 Henry IV. c. 7; 11 Henry IV. c. 3.

[9] For the term see vol. i 223 n. 5. The principal statutes are 14 Edward III. st. 1 c. 6 (Reeves, H.E.L. ii 315, 316); 8 Richard II. c. 4; 1 Henry V. c. 5; 9 Henry V. st. 1 c. 4; 4 Henry VI. c. 3 (Reeves, H.E.L. ii 539); 8 Henry VI. cc. 12, 15; 10 Henry VI. c. 4; 18 Henry VI. c. 9.

[10] Below 571-588.

[11] 1 Edward III. st. 2 c. 12.

[12] 25 Edward III. st. 5 cc. 8, 11.

[13] 14 Edward III. st. 1 cc. 8, 13; 28 Edward III. c. 4; 34 Edward III. cc. 13, 14; 36 Edward III. st. 1 c. 13; see Reeves, H.E.L. ii 253-256.

[14] 15 Edward II. (a writ to the justices of the bench); 34 Edward III. c. 16; 1 Richard 3 c. 7; vol. iii 236-245.

[15] 15 Richard II. c. 5—as the Parliament Roll (iii 291 no. 32) says, "Villes qu'ont Commune et autres qu'ont Offices perpetuelles sont aussi perpetuelles come gentz de Religion."

so that the lord lost all right of escheat, had much to do with the settlement of the scope of high treason in Edward III.'s reign.[1] The rule which disqualified aliens from holding English land was the cause of a statute in the same reign which provided that the children of English parents, though born abroad, should be capable of inheriting, and probably therefore English subjects.[2]

The jealousy which existed between the lay and ecclesiastical jurisdictions produced several statutes upon matters which fell within the jurisdiction of the latter. We get both petitions and statutes on such topics as the fees to be granted for probate,[3] and as to the persons entitled to a grant of letters of administration.[4] The jurisdiction assumed by the common law courts over actions brought by or against the personal representative was the occasion of amending statutes.[5] Matters which were on the debatable ground between the two jurisdictions, such as bastardy, benefit of clergy, tithes, evasions of the statutes of mortmain, rights of presentation, were frequent subjects for legislation, and still more frequent subjects of parliamentary petitions.[6] I have already dealt with the series of statutes directed against papal interference with national affairs.[7]

Comparing these statutes with the Rolls of Parliament, we can see that they were suggested by men who had practical experience of the system of law which they proposed to amend, by men who, for all their strong belief and even pride in its general excellence, were very ready to complain about what they saw amiss. The law's delays, the dearness of writs, the inconveniences of the inconsiderate issue of pardons and protections, were grievances keenly felt in that litigious age, and were therefore frequent causes of protest. Some of the suggestions made show that certain legal rules and doctrines, which lived to trouble Englishmen long after this period in our law, were even then felt to be unreasonable. Thus in 1370, 1373, and 1377 we have petitions to change the time of legal memory;[8] in 1373 there is

[1] Above 449-450. The statutes creating new treasons (above 450) carefully preserve the lord's escheat. For treason generally see vol. iii 287-293; and for escheat and forfeiture see vol. iii 67-73.

[2] 25 Edward III. st. 1; Bacon, Works, vii 652; Duroure v. Jones (1791) 4 T.R. at p. 308; 7 Anne c. 5.

[3] R.P. ii 230 (35 Ed. III. no. 35); ibid iii. 43 (2 Rich. II. no. 46); ibid iv. 8 (1 Hy. V. no. 23); ibid 19 (2 Hy. V. no. 14); ibid 84 (3 Hy. V. no. 47); 31 Edward III. st. 1 c. 4; 3 Henry V. st. 2 c. 8.

[4] 31 Edward III. st. 1 c. 11.

[5] Vol. iii 584; 4 Edward III. c. 7; 25 Edward III. st. 5 c. 5; 9 Henry VI. c. 4.

[6] E.g. 18 Edward III. st. 3; 25 Edward III. st. 4; 15 Richard II. c. 5; 5 Henry IV. c. 11; 2 Henry V. st. 1 c. 3.

[7] Vol. i 585, 586.

[8] R.P. ii 300 (43 Ed. III. no. 16)—"de quel temps nul homme puet avoir verroie cognissance;" so ibid 312 (46 Ed. III. no. 28) and 341 (50 Ed. III. no. 119); see vol. iii 166-171 for the law on this point.

a petition for the modification of the doctrine of *possessio fratris*;[1] in 1377 there is a petition that ships, though they have caused the death of a man, be not deodands, "because it is not the fault of the master of the vessel;"[2] in 1379 there is a petition and a discussion upon the abuses of sanctuary.[3] No doubt some of these petitions asked for unreasonable things, and sometimes they are a little inconsistent;[4] but it is clear that a body of law developed as the common law was developed, in a technical atmosphere, must have profited greatly by such outside criticism. Parliamentary criticism did for the amendment of the law what the jury did for its administration[5]—it tended to modify its technicality and to keep it in touch with the realities of life. We may fairly regard that criticism as the best appreciation of the mediæval common law. Its adequacy shows that the expressions of trust in its excellence which we so frequently find upon these same records are the praise of experts, and not merely the admiration of the ignorant. That it had its serious and peculiar shortcomings we shall see. But probably the equally serious yet different shortcomings of the following period would not have been developed to so great a degree if the doctrines of the common law had then had the benefit of a criticism as enlightened and as constant as it received in the Parliaments of the fourteenth and fifteenth centuries.

(10) The Language of the Law.

There is a famous statute of Edward III.'s reign which was passed in order to promote the knowledge of the law. But it is perhaps of less importance in the history of English law than in any other branch of English history. This is the statute of 1362[6] which enacted that pleas should be pleaded in English and not in French. The statute recites that "the laws, customs, and statutes of this realm are not commonly known in the same realm, for that they be pleaded, shewed, and judged in the French tongue, which is much unknown in the said realm, so that the people which do implead, or be impleaded in the king's court, and in the courts of others, have no knowledge nor understanding of that which is said for them or against them by their serjeants and other pleaders." It therefore enacts that all pleas pleaded

[1] R.P. ii 314 (46 Ed. III. no. xxix)—in the margin of the printed roll there is the word "vacat;" see vol. iii 184-185 for this doctrine.

[2] R.P. ii 345 (50 Ed. III. no. 133); so iv 12 (1 Hy. V. no. 35).

[3] R.P. iii 37 (2 Rich. II. no. 28); for sanctuary see vol. iii 303-307.

[4] R.P. iii 642 no. 63, and ibid 666 no. 34—the first petition limiting the number of attorneys is granted, but the commons in the second admit that the rule is unworkable; cp. ibid 65 (3 Rich. II. no. 46).

[5] Vol. i 349-350.

[6] 36 Edward III. st. 1 c. 15.

in the king's courts or in any other courts "shall be pleaded, shewed, defended, answered, debated, and judged in the English tongue, and that they be entered and inrolled in Latin;" but it provides "that the laws and customs of the same realm, terms, and processes be holden and kept as they be and have been before this time."

This statute is strong evidence of the growing importance of the English tongue; and to the litigant who appeared in person it may perhaps have been of some importance.[1] But it did not effect the purpose for which it was passed. The practice and teaching of the law had become, as we shall see, the monopoly of a class of professional lawyers. Litigants did not usually appear in person. If they were too poor to employ counsel the court could and did assign counsel to assist them.[2] But to understand why it was that this statute was unable to prevail against the settled habits of the lawyers I must make a short digression, and say something of the language, or rather languages, of the law in the Middle Ages.

At the end of the fifteenth century the law had come to use, as Fortescue tells us, three languages—Latin, French, and English.[3] But we should note that the English of which he speaks was not the Old English of Saxon days. The victory of the royal justice of the Norman and Angevin kings had been so complete that few Old English words survived. In the royal courts, it is true, some few survived, the most important of which were within the sphere of public law.[4] The Norman and Angevin kings, as we have seen, found that some of the prerogatives of the Saxon kings were useful to them, and therefore retained the English terms.[5] In the local courts the few which survived had practically disappeared by the end of this period,[6] though it may

[1] Fortescue, De Laudibus c. 48, "And they were wont to plead in French till by force of a certaine statute that manner was much restrained;" for an instance of an English plea by a litigant who appeared in person see Y.B. 21 Ed. IV. Mich. pl. 4 (p. 43), cited vol. iii 643 n. 6.

[2] Y.BB. 20 Ed. III. (R.S.) 238, 240; 11 Ed. IV. Trin. pl. 4; below 491.

[3] De Laudibus c. 48, "In the Universities of England . . . sciences are not taught but in the Latine tongue; and the laws of that land are to be learned in iii several tongues: to witte, in the English tongue, the French tongue, and the Latine tongue"—Fortescue assigns this as the reason why English law is not taught at the Universities.

[4] P. and M. i 59, "Earl was not displaced by count, sheriff was not displaced by viscount, our king, our queen, our knights of the shire are English;" similarly some common legal transactions can be described by English words; "a man may give, sell, buy, let, hire, borrow, bequeath, make a deed, a will, a bond, and even be guilty of manslaughter or theft, and all this in English;" as is there pointed out, by far the greater number of our technical words, whether they deal with the subject matter of the law or the courts, are French.

[5] Ibid 60.

[6] Ibid 63 and note—it is clear from Wyclif's translation of the Bible that "English domesmen might still deem dooms in a moot hall."

be that a few still held their ground on the court rolls which defined the copyholders' tenure.

Latin was the legal language of the twelfth and thirteenth centuries. It was therefore the official language of those branches of the Curia Regis, such as the Chancery and the courts of common law, which had begun to keep plea rolls at this period.[1] The custom of an office or a department upon a matter of second-rate importance, such as the language used in making up a record, is perhaps the most conservative thing on earth. Hence we find that these records continued to be drawn up in Latin till 1731.[2] So usual and regular was it to find the records of old-established courts drawn up in this manner that, as we have seen, the fact that the court of Star Chamber had no Latin plea roll was used in 1641 as a proof of its recent origin.[3]

In the thirteenth century learned clerks may have thought and spoken in Latin;[4] ordinary persons of the upper classes thought and spoke in French, while the lower classes spoke in various dialects of English. But the common law was the law made by the king's courts. It was the law originally of the upper classes; and even when it had become the law of all classes, it was still administered by the upper classes.[5] Therefore, although the formal records of these courts were drawn up in Latin, the cases were "pleaded, shewed, and judged" in French. Naturally the law books and the reports which lawyers made for themselves or for one another were in the same language. The Latin of Bracton gave place to the French of Britton. We have seen that the local courts imitated the practices of the royal courts. They, too, kept Latin rolls, and in them cases were pleaded in French.[6] "We may suspect," says Maitland,[7] "that if the villagers themselves did not use French when they assailed each other in the village courts, their pleaders used it for them, and before the end of the thirteenth century the professional pleader might already be found practising before a petty tribunal and speaking the language of Westminster Hall."

In the fourteenth century English was fast superseding French for ordinary purposes. There are many proofs of this fact besides the statute of 1362. It has been said that "among the political poems and songs preserved from the days of Edward III.

[1] Above 185-186. [2] 4 George II. c. 26. [3] Vol. i 515.

[4] P. and M. i 65, "It is very possible that the learned Bracton thought about law in Latin."

[5] De Laudibus c. 48 tells us that it cost twenty marks a year to maintain a student in one of the Inns of Court, "and thus it falleth out that there is scant any man founde within the Realme skilfull and cunning in the lawes, except he be a gentleman borne and come of a noble stock."

[6] Above 314, 371. [7] P. and M. i. 63.

and Richard II. not a single one composed on English soil is written in French."[1] When, from the king's council, there was developed the separate equitable jurisdiction of the chancellor, the records of his court were kept in English. To say that proceedings were on the "Latin side" of the court of Chancery was to say that they fell within the common law jurisdiction of the chancellor: to say that they were begun by "English bill or petition" was to say that they fell within his equitable jurisdiction.[2] It is, perhaps, the parliamentary records which show, more clearly than any other set of documents, the manner in which Latin gradually gave way to French, and French to English, because they were the records of a body which represented the nation as a whole. We see from these records that at the end of the thirteenth century French was competing with Latin on the Parliament Rolls; and that in the following century it had taken its place.[3] Late in the latter century English begins to compete with French.[4] We get English petitions;[5] and Henry IV. addresses Parliament in English.[6] In Richard III.'s reign we get the first English statutes. The reason for this change is probably somewhat as follows: We have seen that the statute rolls gave place to the enrolments of Acts in this reign; and that for some time before, the text of the Act had been the complete bill, originating in the House of Lords or Commons, to which the king gave his assent. These complete bills were the lineal descendants of the petitions which were the earliest English documents on these records.[7] When the Act itself (i.e. the bill which had received the royal assent) was enrolled, instead of being copied on to a statute roll, it was only natural that its original language should be retained. Even when English had finally prevailed, the parliamentary rolls retained traces both of the Latin and of the French period. The formal parts of the roll were in Latin or French. The formula by which the king expresses his assent to or his dissent from a bill still remains French.[8]

We do not find this development in favour of English in our legal language. The legal profession in the fourteenth and fifteenth centuries had created from their French tongue an exact and a technical language. And as French, partly in consequence

[1] A. W. Ward, Life of Chaucer 19, 20.
[2] Vol. i 450.
[3] P. and M. i 61 n. 2, 64.
[4] As Maitland says, the proclamation of Henry III. accepting the Provisions of Oxford (1258) in English as well as French is unique, ibid 64.
[5] R.P. iii 225 (10 Rich. II. no. 1).
[6] Ibid 423 (1 Hy. IV. no. 56).
[7] Above 439-440.
[8] Le Roy le veult; Le Roy s'advisera; Le Roy remercie ses bons sujets, accepte leur benevolence et ainsi le veult; Soit droit fait come il est desire, Anson, Parliament (2nd ed.) 285-287.

of Edward III.'s statute, became less of a living language, and more of a professional language, its exactness and technicality increased. Let us take Maitland's example, and "think for a moment of 'an heir in tail rebutted from his formedon by a lineal warranty with descended assets.' Precise ideas are here expressed in precise terms, every one of which is French: the geometer or the chemist could hardly wish for terms that are more exact or less liable to have their edges worn away by the vulgar." [1] It was clearly impossible to uproot such a language by statute. As we have seen, a litigant who appeared in person might avail himself of the statute.[2] But, as Fortescue pointed out, lawyers could not plead or judge or read their books or reports in anything but French; [3] and what was said by Fortescue in the fifteenth century was still true in the seventeenth century. "So many ancient terms and words," said Coke,[4] "drawn from that legal French are grown to be *vocabula artis* . . . so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed." French continued to be the language of the law because the technical terms were nearly all French. It is true that it became more and more Anglicized (and Edward III.'s statute may have hastened this process),[5] till it degenerated into a mere slang.[6] For all that lawyers still wrote it and thought in it.[7] To Roger North, who died in 1734, it seemed, as it seemed to Fortescue and Coke, that the rules of English law were "scarcely expressible properly in English," and that "a man may be a wrangler but never a lawyer without a knowledge of the authentic books of the law in their genuine language." [8]

This technical language made for precise thought and exact logic; and thus it played no small part in securing the permanence and sovereignty of the common law. Moreover, it made the common law strong to resist foreign influences. The common

[1] Y.B. 1, 2 Ed. II. (S.S.) xxxvi. [2] Above 478.

[3] De Laudibus c. 48, "But it could never hitherto be wholly abolished, as well by reason of certain *Termes*, which pleaders do more properly expresse in French than in Englishe, as also for that declarations upon originall writts cannot be pronounced so agreeably to the nature of those writts as in French. And under the same speech the formes of such declarations are learned. Moreover all pleadings, arguings, and judgments passed in the king's court, and entered into bookes, for the instruction of them that shall come after, are ever more reported in the French tongue."

[4] Co. Litt. Pref. [5] Y.B. 17, 18 Ed. III. (R.S.) xix, xx.

[6] The process of degeneration may be seen by the extracts given by Pollock, A First Book of Jurisprudence 281-283; for an early instance see Y.B. 37 Hy. VI. Hil. pl. 3, "Nous ne *hyderons* ce mattiere."

[7] Lord Keeper Guildford "seldom wrote hastily in any other dialect: for to say the truth, barbarous as it is thought to be, it is concise, aptly abbreviated, and significative," Lives of the Norths i 29.

[8] A Discourse on the Study of the Laws 13.

lawyer had in his law French a technical language equal in precision to that of the civilian.[1] But in these very excellencies a danger lurked. Law, as Maitland has said, is the point where life and logic meet.[2] If the lawyers habitually use a highly abstract and a highly technical language, which, because it is abstract and technical, is incapable of the slightest change, both the law and the language will tend to lose touch with common life. Life will be sacrificed to logic; and the lawyers will tend to become the slaves of their own abstractions. But as yet this danger is in the future.[3] In this period the lawyers are feeling all the advantages of the exact technical language which they have created.

(11) New developments outside the Common Law.

The greater part of the law relating to external trade, to maritime law, and to international relations fell outside the purview of the common law;[4] and, within the equitable jurisdiction of the chancellor and the council, new doctrines were arising, wholly different from those of the common law.[5] These facts come out clearly enough in the Statute Book and on the Rolls of Parliament. But the Statute Book tells us even less of the development of these equitable doctrines than it tells us of the development of the doctrines of the common law. Almost the only indications are contained in those statutes which deal directly or indirectly with the illegal or fraudulent purposes to which the "use," was sometimes put. I shall deal in detail with these statutes when, in the following Book, I relate the history of the use.[6] As we might expect, the Rolls of Parliament illustrate more clearly than the Statute Book the growth of the use.[7] Perhaps the best illustration of the fact that, in the first half of the fifteenth century, the use had come to be regarded as a form of property, and of the position of the feoffee to uses and the cestui que use, will be found in a petition by the feoffees of Henry V.'s will in 1442.[8] Now that the will has been fulfilled, they say, the property belongs to the king as son and heir. They ask him, there-

[1] Selden, Works v 1337, "Law French which doth as truly and fully deliver the matter in our laws as the Latin in the Imperials."

[2] Y.B. 1, 2 Ed. II. (S.S.) xxxviii. [3] Below 589-590.

[4] Above 471-474; Bk. iv. Pt. I. c. 3. [5] Vol. i 405-407, 454-459, 485-486.

[6] Bk. iv. Pt. I. c. 2; the following is a list of these statutes: 50 Edward III. c. 6; 1 Richard II. c. 9; 2 Richard II. st. 2 c. 3; 15 Richard II. c. 5; 4 Henry IV. c. 7; 11 Henry VI. c. 5; 1 Richard III. cc. 1 and 5; cp. also 11 Richard II. c. 3; 5 Henry IV. c. 1; 7 Henry IV. cc. 5 and 12; 1 Edward IV. c. 1 § 14.

[7] The use appears on the Rolls of Parliament before it appears on the Statute Book, R.P. ii 194 (21 Ed. III. no. 77); for other references bearing on the statutes passed for the regulation of the use see R.P. iii 19 (1 Rich. II. no. 69); ibid 117 (5 Rich. II. no. 92); ibid 445 (1 Hy. IV. no. 159); ibid 558 (6 Hy. VI. no. 63).

[8] R.P. v 56-57 (20 Hy. VI. no. 29).

fore, to take legal possession, "consideryng that the said feffeez have ner title ner interesse therynne but only upon trust and to his use, to execute his wille, as it is afore rehersid; and that the said feffees be but fewe in noumbre, whereby of likelihood the possession thereof by casuelte of dethe myhte rest in oon of theyme, and so descende unto his heires that overlyved; in whiche case, and it fortune upon a Temporall man, thenne his wyfe were thereof endowable, and by such menys your right and interesse thereof by youre lawe, the further fro yow thenne they now be, to youre grete hurt, and to youre likely disheritaunce." The Rolls of Parliament also hint at the possibility of other interferences with ordinary rules of law, besides the interferences involved in the recognition of the use. We find a petition for the restoration of property given as security for a loan which had been paid;[1] a petition for relief from the consequences of the non-payment of a money debt due to the crown by the time stipulated;[2] a petition that an action be stopped by writ of supersedeas, when the plaintiff was proceeding upon a statute staple got, as the defendant alleged, by duress;[3] petitions that executors be made to account.[4] In 1475 there is a petition that the king will "doo, procede, and determyne in like maner wise and fourme as it is usually accustomed to doo daily in writt of sub pena in your Chancery."[5] This testifies to the gradual settlement of the jurisdiction of the chancellor;[6] but though many similar petitions were addressed to the chancellor,[7] it is significant of the unsettled state of the chancellor's jurisdiction that so many of them should still be addressed to the legislature.[8]

These entries on the Parliament Rolls tell us little of the growth of the bodies of law which were arising outside the sphere of the common law. We learn from them little more than that a petition asking for certain relief was presented. Both for the principles upon which the common law courts acted and for the principles upon which the chancellor and the council acted we must look beyond the Statute Book and the Parliament Rolls.

It is clear from this summary that the statutes and the parliamentary records presuppose much legal development; and

[1] R.P. i 374 (14 Ed. II. no. 29).
[2] R.P. ii 196 (21 Ed. III. no. 84).
[3] R.P. iii 275 (13 Rich. II. no. 8).
[4] R.P. v 129 (28 Hy. VI. no. 11).
[5] R.P. vi 144 (14 Ed. IV.).
[6] Vol. i 404, 407-409.
[7] Bk. iv. Pt. I. c. 4.
[8] See e.g. R.P. vi 260 (1 Rich. III. no. 17) a breach of trust by an executor, which consisted in giving away the deceased's property and releasing all right of action, is remedied by what practically amounts to a private Act of Parliament; cp. also ibid 110 (14 Ed. IV. no 6); 2 Henry V. st. 1 c. 1, which gives authority to the ordinary to enquire into the spending by hospitals of their goods upon purposes other

that they give us, sometimes directly, sometimes indirectly, a fair index to its general trend. In particular they show us that the separation between the matters dealt with by the common law courts and the matters which fell outside their jurisdiction is tending to increase; and this, as I have said, is partly the cause and partly the effect of changes in the mode and character of the professional development of the common law during this period. To this professional development we must now turn.

II. The Legal Profession and the Law

It is during this period that the legal profession organized itself and obtained that monopoly of legal business which it still continues to enjoy. It would be no exaggeration to say that it is this fact which has mainly determined the mode and character of the development of the common law. To the legal profession is due the completion of the system of the mediæval common law. Its principles were worked out into a detailed system of logical rules by men who were the masters because they were the creators of this technical system. In the first place, therefore, I shall say something of the legal profession. In the second place I shall give some account of the two chief pillars upon which the edifice erected by this profession rested—the Register of Writs and the Year Books. I shall then say something of the more distinguished lawyers who, either as judges or as writers, helped to form and work this system, and of the main features of the law which they created. Lastly I shall say something of the limitations upon the sphere occupied by the mediæval common law at the close of this period.

The Legal Profession

We have seen that in Edward I.'s reign there were signs that a distinct legal profession was being formed. The pleaders were already a body distinct from the apprentices and the attorneys; and both were becoming subject to fixed rules.[1] Fortescue's book, De Laudibus Legum Angliæ,[2] shows us that, towards the end of this period, this legal profession has been both formed and organized. At the head of the profession, and exercising a

than those intended by their founders; and 11 Henry VII. cc. 38 and 51. Sometimes the chancellor was commissioned to hear these cases "by authority of Parliament," Select Cases in Chancery (S.S.) 75; Spence, Equity i 349 nn. (*g*) and (*i*).

[1] Above 311-318.

[2] Fortescue's famous description of the legal profession is contained in the De Laudibus cc. 48-51. Notwithstanding the criticisms of Serjeant Pulling upon it (Order of the Coif 153, 154) there is every reason to believe that it is both a contemporary and an accurate account; see Fletcher, Pension Book of Gray's Inn xxii n. 1.

general control over it, were the serjeants-at-law and the judges. Beneath them, grouped together in the four Inns of Court, and in the Inns of Chancery, were the various grades of the apprentices of the law, from the Benchers and Readers to the Inner Barristers or students.[1] These Inns of Court were colleges which trained the students in the law and called them to the bar. Each had and still in a measure has its independent, its collegiate life; but in all, as nowadays in colleges of the same University, the customs and the system were and are similar. All were in some sort subordinate to the judges and the serjeants, just as the college now is subordinate to the rulings of its visitor or to the statutes of the university.[2] Just as it is the aim of the modern college to fit its members to take the University degree, so it was the aim of the Inns of Court to educate its members to make a creditable figure in the arena of the courts under the eyes of the judges, and ultimately to attain to the degree of serjeant and to the dignity of the bench. As college and University are separate entities, and yet closely united, so the judges and serjeants on the one hand, and on the other the apprentices of the law in their Inns, were separate bodies, and yet closely welded together by ties of similar education, similar interests, and similar pursuits, into one great profession of the law. In dealing with this legal profession, which has had so great an influence upon the technical development of our law, I shall divide the subject as follows: (1) The Serjeants and the Judges; (2) The Apprentices of the Law and the Inns of Court; (3) The Relation of the Inns of Court to the serjeants and judges; (4) The Legal Profession and the Law.

(1) The Serjeants and the Judges.

By the end of the fourteenth century the serjeants-at-law formed a close body or gild selected by the crown, generally upon the nomination of the judges, from which the ranks of the bench were recruited. We cannot fix precisely the date when they acquired this position. Thus it is clear that the rule that only serjeants were eligible for the bench was not known in

[1] This is the division made by Fortescue c. 8, "Let that geare," says the chancellor, "be left to your Judges and men of law, which in the Realme of England are called *Serjeants-at-law*, and to other professors of the law commonly called *Apprentices;*" it is also made by Langland, Richard the Redeless Passus ii, ll. 349, 350:—

"Seldom were the Serjeants sought for to plead,
Or any prentice of Court prayed of his wits."

[2] No doubt, as is remarked in the Black Books of Lincoln's Inn i xxxviii, there is a contrast in the fact that the Inns of Court were, and still are, "customary societies," i.e. their customs have never been codified; whereas the Universities in England and abroad, at a comparatively early period, codified their statutes.

Edward II.'s reign.[1] It must obviously have grown up in the course of the fourteenth century, as the practice of appointing only professional lawyers became universal; and it is probable that most of the other privileges attached to and the incidents of the serjeants' status grew up at about the same period. The fact that a certain number of lawyers were selected by the crown either to plead or to judge will without difficulty lead, in an age when gilds and other such communities were easily formed, to the rise of a body such as were the serjeants and judges of the Middle Ages.

The position of serjeant-at-law, says Fortescue,[2] is not a degree only, "but also a state no less worshipful and solemn than the degree of Doctors." The chief justice of the Common Pleas, with the consent of all the judges, presented to the chancellor seven or eight names of those who were reputed to be the best lawyers—men who had been learning and practising the law for at least sixteen years. The chancellor then sent to them a royal writ commanding them under a heavy penalty to take upon themselves the degree and state of a serjeant-at-law. The serjeants elect must take an oath of office in the following form: "You shall swear well and truly to serve the king's people as one of the serjeants-at-law, and you shall truly counsel them that you be retained with after your cunning; and you shall not defer nor delay their causes willingly, for covetess of money or other thing that may turn you to profit; and you shall give due attendance accordingly."[3] This state and degree therefore was a public office, and, as Brooke said,[4] the name of serjeant is a "nosme de dignite comme chevalier." They took rank above esquires and upon an equality with knights.[5] They were on the highroad to the bench, and were already regarded as members of the court of Common Pleas.[6] Like the other officers of the court they and their servants could only be impleaded in their own court.[7] They often acted as itinerant justices, and fines were levied before them.[8] They frequently

[1] Y.B. 3, 4 Ed. II. (§§) xvii, xviii; above 318.

[2] De Laudibus c. 50.

[3] Pulling, Order of the Coif 229 n. 1.

[4] Bro., Ab. *Nosme*, pl. 5.

[5] Manning, Serviens ad Legem note lviii; Pulling, op. cit. 254-258. When knighthood was a burdensome obligation the serjeants were exempt from it, Manning 190; Dugdale, Orig. Jud. c. li; the first serjeants to be made knights, after knighthood had come to be regarded as a dignity, were made in 1535, Dugdale loc. cit.

[6] Y.B. 11 Ed. IV. Trin. pl. 4, *Brian* said, "un serjant est ministere de court, sans queux le court ne poit estre serve ne occupy."

[7] Cro. Car. 84 (1628); vol. i 203, 453.

[8] Chaucer says of the Serjeant:—

> "Justice he was ful often in assise,
> By patent and by pleyn commissioun;"

Manning, op. cit. note liv; 14 Ed. III. st. 1 c. 16.

attended Parliament,[1] and doubtful questions of law and questions of law reform were referred to them by the council or by Parliament.[2] Some of their members were generally amongst the triers of petitions. They wore a distinctive dress minutely described by Fortescue, the characteristic feature of which was the white coif of silk—"and neither the justice nor yet the serjeant shall ever put off the coif, no not in the king's presence, though he be in talk with his majesty's highness."[3] Once a serjeant always a serjeant. It was only by special royal writ that a serjeant could cease to be of the Order of the Coif.[4] Of the more distinguished serjeants the crown retained certain to be king's serjeants.[5] They were created by letters patent, and fulfilled some of the duties of the modern Attorney and Solicitor-General, in return for which they were paid a fixed salary by the crown.[6] Their oath of office was "well and truly to serve *the king and his people* as one of his serjeants-at-law;" and they were summoned by special writ to Parliament.

The ceremonies attending the creation of serjeants were lengthy and costly. They took a solemn farewell of their Inn of Court, of which they ceased to be members on becoming serjeants; and they were rung out of the Society by the chapel bell.[7] The ceremony of conferring the degree as it existed in 1666 is thus described by Dugdale:—[8]

"On the morning of that day, on which he is to receive his degree, Wine and Cakes are sent to one of the *Serjeants Innes*,

[1] Manning, op. cit. note xxv.

[2] R.P. i 345 (8, 9 Ed. II. no. 33); ii 185 (21 Ed. III. no. 44); iii 101 (5 Rich. II. no. 32), "Et q'au present par serement deux Justices, deux Serjantz, et quatre loialx Apprentices, vous plese estre enfourmez de les meschiefs que le poeple ont soeffert par Termes en la Loie et par delaies," etc.

[3] De Laudibus c. 50; Dugdale, Orig. Jud. c. 1; Langland, in his Vision of Piers Plowman (Skeat's ed. i 15), tells us how

> "Conscience and the kyng into the court wenten,
> Wher hovede an hondred in hoves (coifs) of silke,
> Seriauntes they semede, that serven at barre
> To plede for penyes and poundes the lawe."

[4] Dugdale, op. cit. c. liv, giving writs of Mary's and Elizabeth's reigns.

[5] Pulling, op. cit. 40-42; Manning, Serviens ad Legem ix, thinks that originally all serjeants were at first king's serjeants, and that it was not till later that a special appointment was necessary; he points out that Coke, Second Instit. 422 says, "Albeit the king make choice of some serjeants to be of his counsel and fee, yet in a general sense all be called the king's serjeants, because they be all called by the king's writ." North, Lives iii 138 says there were two of them; but from Dugdale's Chronica Series it would seem that in the fifteenth and sixteenth centuries the number varied.

[6] R.P. v 14 (18 Hy. VI. no. 27), a petition for the payment of the salaries of the judges, serjeants, and the king's attorney; for the manner in which they were superseded by the Attorney and Solicitor-General see Bk. iv Pt. I. c. 8.

[7] This custom long remained at Lincoln's Inn, Black Books i xxxix.

[8] Op. cit. c. lii; for other similar descriptions see ibid cc. xliii-xlvi; Black Books of Lincoln's Inn i 278-281; Wriothesley's Chronicle (C.S.) ii 77-78, and Machyn's Diary (C.S.) 26-27 (1552).

for the Judges and Serjeants: as also to that Inne of Court whereof the new Serjeant is; there to be presented to the Benchers and others of that Society. After which repast, the said Benchers and Barristers repair to the *Serjeants Inne*, where all the old Serjeants are, passing two and two together; the Warden of the Fleet, and his Tipstaves, with the Marshall of the Court of *Common Pleas*, proceeding all bareheaded before them.

"And from *Serjeants Inne* they proceed, in like sort, to Westminster. And being come neer to the Hall (about ix of the clock before Noon) the new elected Serjeant in some private place, putteth on his parti-coloured Robe; and having so done (the Warden and other officers still attending) he entreth *Westminster* Hall, and passeth to that part of it, directly opposite to the Court of Common Pleas. Where the Court being set, and all business ceasing, two of the old Serjeants recede from the Barr with a solemn Congé, and go towards the new Serjeant; and when they come to the midway betwixt him and the Court, they turn their faces toward the Court, and make a second Congé, and when they are come to the said new Serjeant they make their third Congé towards the Court. And then, after a little pawse, they proceed to the Court again, with the new Serjeant betwixt them; making their three Congés; viz. the first at their going forwards, the second in the midway, and the third at the Barr of the Court.

"Being thus come to the Barr (after a formal exhortation [1] given to him by the Lord Chief Justice of the *King's Bench* who is to be then there sitting with the other Chief Justice, and the rest of the Justices of the Court of *Common Pleas*) he declareth upon a real Writ, of what nature soever he himself pleaseth; and in Law French; which being done, the most antient Serjeant maketh answer, by way of Defence; and demandeth that the writ be read. And so being read and pleaded, and entry made thereof by the Prothonotary; the second antient Serjeant offereth emparlance thereto. And then the Serjeant elect, passing from the Barr into the Court, kneeleth down at the feet of the Lord Chief Justice of the King's Bench, where having first taken the Oath of Supremacy, the oath of a Serjeant at Law is by the Clerk of the Crown read to him: . . .

"Which being done the Lord Chief Justice of the King's Bench putteth the Lawn Coif on his head, and the Hood on his Shoulder. After which performed, the Court ariseth, and all depart."

But the actual conferring of the degree was but a small part

[1] For a specimen of these exhortations see Pulling, op. cit. 231-234.

of the ceremony. The serjeants "must keep a great dinner like to the feast of a king's coronation," and the accompanying festivities lasted seven days.[1] We can see from the Statute Book that it was an occasion to be compared, as Fortescue compares it, to a coronation, to the instalment of a bishop, to the creation of a knight of the Bath, or to the inception of a clerk at the University.[2]

"The ordinary business of the court at Westminster was suspended, the judges and other members of the old order of the Coif, the benchers and apprentices of the Inns of Court, the ancients of the Inns of Chancery, with the high officers of state, and even the Sovereign and members of the royal family, nobles and bishops, and the Lord Mayor and City officials, mustered in strong force to mark the occasion of a new call of members of the order, entrusted with the great work of administering the law."[3]

As on other similar festivals, so on the creation of serjeants, the occasion was marked by a presentation of rings—engraved in later days with appropriate mottoes—to the value of £40 at least; and Fortescue tells us that the rings which he gave when he was made a serjeant "stood him in fiftie pounds."[4] All the high officials and the nobility present at the feast, the judges, the barons of the Exchequer, the master of the rolls, the chamberlains of the Exchequer and other officials of the court, were given rings; "insomuch that there shall not be a clerk, especially in the court of the common bench, but he shall receive a ring convenient for his degree." Moreover, similar rings were given to their friends; "and also liveries of cloth of one suit of colour in great abundance, not only to their household meany, but also to their other friends and acquaintances which during the time of the aforesaid solemnity shall attend and wait upon them." The occasion was specially excepted from the statutes prohibiting the giving of liveries.[5] The serjeants' feasts

[1] De Laudibus c. 50.

[2] 8 Edward IV. c. 2, one of the statutes forbidding the giving of liveries, except "any livery given or to be given at the King's or Queen's coronation, or at the Stallation of an Archbishop or Bishop, or Erection, Creation, or Marriage of any Lord or Lady of Estate, or at the Creation of Knights of the Bath, or at the Commencement of any Clerk in the University, or at the Creation of Serjeants in the Law."

[3] Pulling, op. cit. 235.

[4] De Laudibus c. 50; Pulling, op. cit. 245 says, "The usage of giving a ring *fidei symbolo* is certainly very old. It has been always observed at the coronation of our Queens and Kings, as at the marriage or betrothal of ordinary folk; and at the installation of Knights of the Garter the solemnity has always been accompanied by the presentation of rings;" the custom of engraving mottoes dates probably from the reign of Elizabeth, ibid 246 n. 2.

[5] Above n. 2.

and the custom of giving liveries lasted till 1759. The gifts of rings lasted as long as the Order of the Coif itself.[1]

The ceremony, like other similar ceremonies in the Middle Ages, had its religious side. Churches then, and at a much later period, were used to transact legal business.[2] The "parvis"[3] of St. Paul's Cathedral was the place where the serjeants, standing each by his allotted pillar, used to give advice to their clients. At this period the newly made serjeants made offerings at the shrine of St. Thomas of Acons,[4] and went from thence to St. Paul's and made offerings at the shrine of St. Erkenwald, after which ceremony their pillars were allotted to them. These offerings continued up to the Reformation; and the ceremony of allotting pillars till old St. Paul's was burnt in the fire of London (1666).[5] It is not surprising to hear that "none of those elect persons shall defray the charges growing to him about the coastes of this solemnitie, with lesse expences than the summe of foure hundred markes;"[6] nor to hear that occasionally persons were reluctant to take upon themselves so expensive a dignity.[7]

But, if we may believe Fortescue, the outlay was profitable. "Neither is there any man of Lawe," he says, "throughout the universal world which by reason of his office gaineth so much as one of these serjeants." Chaucer's serjeant was a "gret purchasour." The fees paid to them were larger than, possibly double,[8] those paid to an apprentice or attorney. As we have seen, to become a serjeant was a condition precedent to becoming a judge. Until the last century they had the monopoly of practice in the court of Common Pleas;[9] and, perhaps at one

[1] Pulling, op. cit. 240, 241, 246.

[2] Ibid 69 and notes; the Round of the Temple Church appears to have been so used in James I.'s reign; in Y.B. 5 Ed. II. (S.S.) 120 it is stated in the record that a writ of prohibition was served "in the nigher Hall of the Church of all Saints at Oxford."

[3] Du Cange defines the word *Paradisus* as "Atrium porticibus circumlatum ante ædes sacras: vulgo parvis;" Chaucer's lines are well known.

[4] I.e. St. Thomas of Canterbury; this name, affected by the citizens of London, was derived from the miracle said to have been performed by the saint at the siege of Acre, Pulling, op. cit. 243.

[5] Dugdale, who wrote just after the fire, refers (Orig. Jud. 142) to "St. Paul's Church where each Lawyer and Serjeant at his Pillar, heard his Client's Cause, and took notes thereof upon his knee, as they do in Guildhall at this day;" he goes on to say that after the feast, "they do still go to St. Paul's in the Habits, and there choose their Pillar, whereat to hear their Clyent's Cause (if any come) in memory of that old Custome."

[6] De Laudibus c. 50.

[7] R.P. iv 107 (5 Hy. V. no. 10).

[8] Y.B. 31 Hy. VI. Mich. pl. 1, Moyle *arguendo* said, speaking of retainers, "Et si nul denier en certein soit a luy promis donques il aura tant en comon droit luy done, come a Serjeant xl deniers et a l'attorney xx deniers de cesty que luy retenut."

[9] This is stated as settled law by *Brian* in Y.B. 11 Ed. IV. Trin. pl. 4, "Nul doit pleder ici pro auter forsque Serjeant est, mes un Apprentice et chescun auter en son matiere demesne serra resceu de pleder aillours;" there is a translation of this case in Manning's Serviens ad Legem note xxxviii, and for the pleadings

period, in the court of the Marshalsea.[1] They were not, however, restricted to the court of Common Pleas. They could practise in any of the other courts of common law[2] as well as before the chancellor and the council; and, from a very early period,[3] they might be required by any of these courts to plead for a poor man.[4] Contracts with counsel were then enforceable at law; and counsel could be sued for negligence if they did not properly conduct their clients' cases. We can therefore get a little information as to the conditions under which they carried on their business from the disputes as to counsel's retainers or conduct which occasionally came before the courts of common law.[5] Counsel dealt directly with their lay clients, and were sometimes engaged by them[6] or their attornies[7] for a fixed period. Both the king and other litigants paid them in kind by liveries of cloth and robes;[8] and just as the statutes forbidding maintenance were necessarily relaxed in order to allow the retainer of counsel,[9] so

see Rastell, Entries 178c; but Y.B. 17 Ed. IV. Hil. pl. 4 would seem to imply that the rule was not quite settled; counsel for the defendant was allowed to plead in abatement of the writ, though another counsel had pleaded to the action, "pur ceo que il fuit matter apparent, et auxi le barre ne fuit plede par un Serjeant."

[1] R.P. ii 140 (17 Ed. III. no 3), a petition that on account of the lack of serjeants in this court each suitor may plead for himself.

[2] Y.B. 3, 4 Ed. II. (S.S.) xxii.

[3] In the Bills in Eyre (S.S.) no. 25 (1292) there is a request by the plaintiffs that the court will "grant them a serjeant," "for that they are poor folk."

[4] They could be required to plead either in the K.B. or the C.B. Y.B. 11 Ed. IV. Trin. pl. 4, *Genney* said, "Jeo voy mon master Cheine chief justice de Bank le roy venir en cest court, et require les Serjeants d'estre de councel en un plee que fuit devant luy, et s'ils ne voillent il voilloit avoir forjuge eux de pleder en Bank le Roy:" *Littleton*, J., Bene potuit; S. C. *Brian*, C.J., said that if a serjeant declines to plead for a poor man when the court orders him, "nous ne lui poyomes faire non Serjeant car il ad ce nosme donne par le Roy, mes nous poioms luy estrange del barr, issint que il ne serra resceu de pleader," etc.; the boroughs had a similar rule, Borough Customs (S.S.) ii 8, 16.

[5] Y.B. 11 Hy. VI. Hil. pl. 10 there is a long discussion as to the duties of counsel to their clients; Y.B. 14 Hy. VI. pl. 58 *Paston*, J., says, "Et si vous qui estes Serjeant ad legem empristes sur vous a pleder mon ple et ne faites point ou faites en autre maner que je disois a vous per quod jeo ay perte j'aurai Acc' sur mon cas;" Y.B. 20 Hy. VI. Trin. pl. 4 it is said, "Car mettons que jeo retiens un qui est apris de Ley d'estre de mon conseil ove moy en le Gildhall de Londres tiel jour, a quel jour il ne vient pas, par que ma matiere est perdue, or il est charge a moy per action de Deceit."

[6] Manning, op. cit. note xi cites an indenture made between Serjeant Yaxley and Sir R. Plumpton to be of counsel with the plaintiff at the next assizes of York, Notts, and Derby for a fixed fee; cp. also ibid note lxiii; as late as 1619 there is a case turning on a grant of an annuity to counsel pro consilio impendendo, Mingay v. Hammond Cro. Jac. 482.

[7] Such a case seems to be contemplated in Y.B. 15 Ed. III. (R.S.) 344, 346.

[8] So Chaucer says of the Serjeant:—

> "For his science, and for his heih renoun,
> Of fees *and robes* had he many oon."

[9] Above 313 n. 11; Y.B. 39 Hy. VI. Mich. pl. 8, in which the question is discussed whether the retainer of counsel by the master for his servant amounts to maintenance; cp. also Y.BB. 21 Hy. VI. Mich. pl. 30, and 22 Hy. VI. Mich. pl. 7.

the statutes forbidding liveries were relaxed in order to legalize this customary mode of payment.[1] In that litigious age the serjeants probably soon gained enough by their practice to compensate them for the expenses of their elevation to the state and degree, which placed them in the front rank of the profession of the law.

The elevation, then, to the dignity of serjeant was the great step forward in the profession. It made the lawyer a member of the great gild which administered the law; and it placed him almost on an equality with the bench. The serjeants and judges were brothers of the Order of the Coif. To the end they addressed one another as such, and lodged together at the Serjeants' Inns.[2] We are not surprised to find that the creation of a judge was, compared with the creation of a serjeant, an informal affair.

"As oft," says Fortescue,[3] "as the place of any of them (the judges) by death or otherwise is voide, the king useth to choose one of the Serjeants at Lawe and him by his Letters Patents to ordaine a Justice, in the place of the Judge so seasing. And then the Lord Chancellor of England shall enter into the Court, where the Justice is so lacking, bringing with him those letters patents, and sitting in the midst of the Justices causeth the Serjeant so elect to bee brought in, to whom in the open Court he notifieth the King's pleasure touching the office of Justice then voide and causeth the foresaid letters to be openly reade. Which done, the Master of the Rolles shall reade before the same elect person the oath that he shall take, which when he hath sworne upon the holy Gospell of God, the Lord Chancellor shall deliver unto him the king's letters aforesaid, and the Lord Chief Justice of the Courte shall assigne unto him a place in the same, where he shall place him, and that place shall he afterward keepe." There was no further solemnity; for this was an office only and no degree in the faculty of the law. There was some change made in their robes, but they still retained their coif.

[1] 1 Henry IV. c. 7 it is provided that no one shall give livery of cloth, "but only to his menial Servants or Officers or to them that be of his Counsel; as well Spiritual or Temporal learned in the one law or the other;" there is a similar clause in 8 Edward IV. c. 2.

[2] For these Inns see Dugdale, Orig. Jud. cc. lxxiii and lxxiv; Pulling, op. cit. 126, 127; L.Q.R. xxxv 264-265. The two most important of these Inns were in Fleet Street and Chancery Lane. In 1758 the Inn in Fleet Street was given up. In 1834 the freehold of the Inn in Chancery Lane was purchased from the see of Ely. When, by the operation of the Judicature Acts, the Order of the Coif was doomed, the property was sold. It should be noted that the Serjeants' Inns were in effect clubs; they were not bodies like the Inns of Court or Chancery which were responsible for legal education. There was therefore no legal objection to the sale of the property and its distribution among the surviving serjeants.

[3] De Laudibus c. 51.

The judges, according to Fortescue, usually sat from 8 a.m. till 11 a.m. The rest of the day they spent "in the study of the lawe, in reading of Holy Scripture, and using other kind of contemplation at their pleasure." This is perhaps too rosy a picture. We have reason to know that some of the judges spent their time less innocently;[1] and the statement that none were ever known to be corrupt is a deliberate untruth.[2] We cannot doubt, however, that Fortescue—himself a serjeant and a judge—has drawn us a unique, and in its main outlines a truthful, picture of that Order of the Coif of which he was so distinguished a member.

(2) The Apprentices of the Law and the Inns of Court.[3]

We have seen that as early as the reign of Edward I. the judges had been directed to make some provision for the apprentices of the law.[4] It was during these centuries that these apprentices became organized; and we begin to be able to discern the attorneys, the students, and the barristers of the present day. They attained this organization by a road different to that which the serjeants pursued. The serjeants, as we have seen, were a gild or order selected mediately or immediately by the crown. They had their Inns—but this is, so to speak, an afterthought, a matter of convenience. Their bond of union is found in their common profession and their common privileges.[5] On the other hand, it is through the education, the discipline, and the common life of the Inns of Court and the Inns of Chancery that the legal profession, under the degree of serjeant, obtained both its education and its organization; and in the Inns the serjeants had no part.[6] Of the Inns of Court and Chancery, therefore, I must say something.

[1] See e.g. R.P. iii 200 no. 18, a complaint that the judges are too often found in the retinues of the great lords; and above 415 for the conduct of Sir Robert Tirwhit.

[2] Plummer, Fortescue, Governance of England 22, and authorities there cited; below 565.

[3] The chief authorities upon this subject are the Black Books and Admission Registers of Lincoln's Inn; the Pension Book of Gray's Inn; the Calendar of the Inner Temple Records; the Calendar of the Middle Temple Records; Minutes of Parliament of the Middle Temple; A. R. Ingpen, The Middle Temple Bench Book; Dugdale, Orig. Jud., gives the history of the Inns of Court and Chancery, and various orders made both by them and by the judges for the regulation of the profession; for a shorter account see Pearce, A History of the Inns of Court and Chancery. Perhaps the best account of the origins of the Inns is to be found in Mr. Fletcher's introduction to The Pension Book of Gray's Inn; see also L.Q.R. xxi 346, an article by Mr. Marchant upon the Middle Temple Records; Law Mag. and Rev. (1899-1900) for Notes on the Early History of Legal Studies; and two articles by Mr. Bolland in L.Q.R. xxiii 438, and xxiv 392.

[4] Above 314-315.

[5] They are somewhat like the foreign gilds or fraternities of lawyers, for these see Maitland, English Law and the Renaissance 88, 89.

[6] As Mr. Fletcher points out (Pension Book of Gray's Inn xi, xii) this is the great contrast between the organization of the profession of the law and the organization of

As with the serjeants and the judges, so with the Inns of Court and the Inns of Chancery, we must look to Fortescue for our earliest connected information.[1] In his day there were four greater Inns of Court—Lincoln's Inn, Gray's Inn, the Inner, and the Middle Temple—and there were about ten lesser Inns called the Inns of Chancery. In each of the greater Inns there were about two hundred students; in each of the lesser Inns there were at least one hundred. They were peopled by students for the most part of noble birth; and there these students learned not only law, but history, scripture, music, "dancing and other Noblemen's pastimes as they used to do which are brought up in the King's house." Many sent their children to be educated in these Inns, though they "desired them not to live by the practice of the Lawes." The two Universities taught only the civil and canon law: the Inns taught English law. And thus, because they gave an education more practically useful to those who were to be men of affairs in that litigious age, they came themselves to form "an university or schoole of all commendable qualities requisite for Noblemen." [2]

Of the origin of this "University," which is thus described as flourishing in the middle of the fifteenth century, even the lawyers of the sixteenth century could only conjecture.[3] The older records of the Inns of Court are lost. Those which we possess describe existing institutions with rules and traditions which presuppose an existence of some duration. Fortescue was a member of Lincoln's Inn, and a governor of the Inn in 1425, 1426, and 1429. If he had known anything of its foundation he would probably have said something. That he says nothing of the origin of this Society, or of any other, would seem to imply that he knew nothing; and it follows from this that we must put their origin well back into the fourteenth century.[4] "The general

the Universities. The state and grade of a serjeant was similar, as Fortescue said, to that of a doctor; but a doctor remained a member of his college and of the governing body of the University, while the serjeant left his Inn. Unlike a doctor he ceased to teach; and his relation to the Inns in conjunction with the other serjeants and the judges was rather like that of a visitor.

[1] De Laudibus c. 49.

[2] Co. Rep. Pt. III., Pref. "the most famous Universitie for profession of law only, or of any one human Science that is in the world."

[3] Ibid, "Of the antiquity of these houses and how they have been changed from one place to another, I may say, as one said of ancient cities, *Perpancæ antiquæ civitates Authores suos norunt*."

[4] Lincoln's Inn, Admissions i vi, "The earliest minutes of the Black Book disclose a body bearing a corporate name, *Societas de Lincoln's Inn*, with a formed and well-established constitution; its 'Rulers or Governors' following one another in an apparently organized sequence, with authority over members, property, and discipline of the Society, and enforcing their decisions and authority by censure, fine, suspension, or expulsion; a settled form of admission based on suretyship, and an equally settled system of call to the Bar and invitation to the Governing Body. Such a state of

development," says Mr. Fletcher,[1] "of collegiate institutions during the fourteenth century, the advance in importance of the common law and its professors, the rise of the class of practising apprentices and the evidence of the congregation of lawyers during Richard II.'s time in and around the Temple, all go to make this credible." [2]

In the fourteenth century, however, we have but the scantiest records of them. Chaucer speaks of the Temple in connection with the law.[3] Walsingham [4] mentions the attack made upon the Temple by the rebels in 1381 because it was the house of the lawyers. We have a reference in the Year Book of 29 Edward III. to the apprentices in their hostels.[5] We have little more than these scattered notes; and we can therefore only supply by conjecture and analogy the want of more definite information.

We know that in Edward I.'s reign there were a class of apprentices of the law, and that the crown desired the judges to exercise some control over them. We know that the common law was becoming a definite science, and that it was not taught at the Universities.[6] These two facts, and the analogy of the origins of the mediæval Universities, must be the guides to our conjectures as to the origin of the Inns of Court.

It is in connection with the apprentices that we first hear of the Inns or "hospitia." Probably, as Mr. Fletcher says, "the earliest hospices . . . originated, as did the halls at Oxford, in

things cannot have come suddenly into existence, but must have been the growth of many years;" so too as to Gray's Inn, Pension Book ix, "The entries record the appointment of an executive with functions already defined by an electorate with qualifications already recognized."

[1] Pension Book xxii.

[2] Cp. Middle Temple Records i Introd. (4), "The tendency of the time was for the followers of a common trade or calling to form themselves into guilds or fraternities for the study and advancement of their several crafts, the protection of their common interests and the preservation especially of the monopoly they claimed for their particular trade or calling."

[3] Of the Manciple, *of a Temple*, he says:—

> "Of maysters hadde he moo than thries ten,
> That were of lawe expert and curious;
> Of which there were a doseyn in an hous."

Chaucer's evidence is the more valuable if it be true that he was himself a member of the Temple. In Speght's edition of Chaucer (1574) it is stated that he was of the Inner Temple on the authority of "Master Buckley," who, as chief butler of the Inner Temple, had access to records which are now lost, Calendar of Inner Temple Records ii viii; if this be so, Chaucer's reference to "A Temple" would be strong evidence that in his day the Societies were not divided.

[4] S.a. 1381, "Satis malitiose etiam locum qui vocatur Temple Barr in quo Apprenticii juris morabantur nobiliores, diruerunt . . . ubi plura munimenta quæ juridici in custodia habuerunt, igne consumpta sunt;" cp. Dugdale, Orig. Jud. c. lvii.

[5] Y.B. 29 Ed. III. Mich. p. 47.

[6] Fortescue, De Laudibus c. 48, above 478 n. 3. The great fact is that English law was not taught there. If it had been, would the Inns of Court have ever attained their present shape?

the hire of a house by a party of students, who, at the requirement of the landlord, named one of their number as the person responsible for the rest, and afterwards committed to him the direction of their Society."[1]

From the first there must have been grades among the apprentices. There were among them elder men who were fit to conduct cases. There were also younger men who assisted their elders, and who in return were taught by the elders. These elder men would naturally assume the headship of such a society; "and a number of Masters of the Law, drawn by the ties of a common profession to live together in London, each of whom took pupils whom he housed, educated, and controlled, would tend to assume a quasi-corporate form."[2] If this conjecture as to the origin of the Inns is correct it would account for the fact that there are no signs of democracy in their constitution. We get the oldest authentic records from Lincoln's Inn. In 1422 we see there a society in which the Benchers, a body co-opted by themselves from among the members of the Society, are entrusted with full educational and administrative control; and there are no signs in the records or traditions of the other Inns that matters had ever been otherwise with them.[3] Probably, then, we must look to some of the smaller Inns of Chancery for some hints as to the origins of the privileged position ultimately attained by the four great Inns of Court.

It is not unlikely that the serjeants and the judges, who desire to regulate and organize the legal profession, assisted the older apprentices, who governed these smaller Inns, to maintain order and to educate their juniors, by allowing those alone whom they called to the bar of the Inn to practise in the courts.[4] That this is the origin of the absolute and exclusive right of the Inns of Court to call to the bar is probably for the following reasons: (i) The call to the bar—the ceremony by which then as now this selection is made—is a call to the bar of the Inn.[5] Those thus selected were and are tacitly allowed by the judges to practise in the courts.[6] In fact it was not till 1868 that there was anything like an official roll of barristers; and even now it is a

[1] Pension Book xii. [2] Black Books of Lincoln's Inn i xl.

[3] Pension Book of Gray's Inn xiii. Mr. Fletcher sees these teaching apprentices in those selected by the ordinance of 1292 (above 315)—"In these practising and teaching apprentices—masters probably in a new gild—we may recognize the class from which came the founders of the two Temples, Lincoln's Inn and Gray's Inn."

[4] Ibid xiv; cp. L.Q.R. xxiv 397; xxix 23-24. [5] Ibid.

[6] "The Benchers call to the bar of their respective Inns, and the Judges receive at the Bar of the Court without further form or ceremony those whom the Benchers, as their authorized deputies, have called. And this reception by the Judges, without verbal expression, and consisting of nothing more than a tacit permission to a barrister called to the bar of his Inn by the Benchers of his Inn to appear at the Bar of the

question whether entry on this roll is a necessary part of the making of a barrister.[1] (ii) We know that in later times the call to the bar was made by or on the recommendation of the Reader —the member of the bench responsible during his term of office for the teaching of the students.[2] (iii) The judges in the sixteenth century issued orders as to the conditions under which a call to the bar was to be allowed;[3] and at Lincoln's Inn, as late as 1578, they had some sort of control over the Reader.[4] At the present day a student has a right of appeal to the judges against a refusal to call to the bar or against a sentence of expulsion.[5]

Thus it has been conjectured with great probability that we must seek the germs of the Inns of Court in "a body of Masters of the Faculty of Law, giving lectures and instructing their pupils in law; and when satisfied of the proficiency of their pupils, admitting them to the order of Masters by calling them to the Bar; and further . . . enforcing on the newly called an *inceptio* after the fashion of the great mediæval Universities. It becomes at any rate possible to understand how Fortescue, Coke, and Selden speak of the Inns of Court as Universities for the study of

Courts unchallenged, seems to have consequences of some technical importance. . . . How and when do we become barristers-at-law? I take it that it is when we are received by the Judges; and that it is reception by them, in accordance with some long lost or, may be, never formally recorded agreement between them and the Benchers of the Inns of Court, that clothes us with the full status. If this be so, the question arises whether a barrister who has never taken his seat in Court, and has, consequently, never been received by the Judges, is entitled to describe himself as anything more than a barrister of his own Inn of Court," Bolland, L.Q.R. xxiv. 397-398.

[1] Bolland, L.Q.R. xxiii 438-441; 1 William and Mary Sess. 1 c. 8, provided that barristers and certain others should take the oath therein set forth in the court of King's Bench, or, if they lived in the country, at Quarter Sessions; and these "Swearing Rolls" are preserved in the Record Office. The Promissory Oaths Act of 1868 (31, 32 Victoria c. 72) repealed this Act; barristers therefore could no longer sign a "Swearing Roll;" but the judges decided that all barristers, on being called, should sign a roll to be kept by the Master of the Crown Office—such signature is no doubt, as Mr. Bolland says, a form of reception by the judges.

[2] Black Books i 339 (1563), "Calls to the Bench or Bar are to be made by the most ancient, being a Reader, who is present at supper on call night;" cp. Pension Book, Gray's Inn 94; apparently the Reader might call "absolutely" or call subject to the approbation of the bench—thus Whitelock tells us (Liber Fam. (C.S.) 61) that he and Benjamin Rudyerd "wear called to the bar togeather by Mr. Nicholas Overburye, in his reading August 1600, but I was called absolutely, and he so as the Bench wolde allow it at the term."

[3] Middle Temple Records i 124 (1559); 201 (1574).

[4] Black Books i xvi 410, "The Judges to be asked their pleasure whether, although Mr. Reader be willing to Reade, yet considringe his wekness it be convenient to have a Redinge."

[5] Rex v. Benchers of Gray's Inn (1780) 1 Dougl. 353; Rex v. Lincoln's Inn (1825) 4 B. and C. 855; Rex v. Barnard's Inn (1836) 5 Ad. and E. 17; cp. Marchant, Barrister at Law 5; and see 36 and 37 Victoria c. 66 § 12 for the modern rule. Neither the courts acting judicially, nor the judges acting as visitors, can compel an Inn of Court to admit any person as a member, see L.Q.R. xx 8.

the Law on the same footing as the Universities of Oxford and Cambridge."[1]

It is easy to see how it was that, when the older Inns grew too small for their members, they moved into more commodious quarters, taking with them their old organization, their old traditions, and sometimes their old name.[2] They could the more easily do this because, as we shall see, the Inns were at this period only rented by the apprentices. If their old quarters were occupied by new societies of students, these new societies might well wish to connect themselves with the older society, and so become the homes of those junior[3] students who hoped in time to join the older society. Thus, in later times, we find that to each of the four Inns of Court certain of the Inns of Chancery were attached. To Lincoln's Inn there were attached Thavy's Inn and Furnivall's Inn; to the Inner Temple Clifford's Inn,[4] Clement's Inn, and Lyon's Inn; to the Middle Temple New Inn and Strand Inn; to Gray's Inn Staple Inn and Barnard's Inn. Moreover, there was nothing to prevent the spontaneous growth of new Inns of this kind, which would naturally desire to connect themselves with one of the greater Inns. This would account for the uncertainty of Fortescue as to their exact number.[5] It would also account for the fact that the nature of the control exercised by the greater Inns over these smaller Inns was very vague. The greater Inns supplied the lesser Inns with their readers; in some cases they were their landlords; and the policy of the council in the sixteenth century seems to have been to give some sort of visitatorial or even disciplinary powers to the greater Inns, subject, however, to an appeal to the judges.[6] But it is difficult to lay down any very precise or general rule applicable to the relations of all these Inns of Chancery to the Inns of Court. In 1905, in the case of *Smith v. Kerr*, Farwell, J., said[7] of the relationship of Clifford's Inn to the Inner Temple that "it was affiliated in some sort of sense

[1] Black Books of Lincoln's Inn i xl.

[2] Mr. Baildon (Black Books of Lincoln's Inn iv 294, 295) tells us that this was one of the conditions in the conveyance of Clifford's Inn in 1618; he thinks that this very likely happened in the case of Lincoln's Inn, ibid; cp. Pitt-Lewis, History of the Temple 64-67.

[3] In Fortescue's time the students of the Inns of Chancery were for the most part "young men, learning or studying *the originals*, and as it were the elements of the Lawe, who . . . as they grow to ripenesse, so are they admitted into the greater Innes of the same studie, called the Innes of Court;" cp. Y.B. 37 Hy. VI. Hil. pl. 4.

[4] For the history of this Inn see Smith v. Kerr [1900] 2 Ch. 511.

[5] He says, De Laudibus c. 49, "There be tenne lesser houses or Innes and sometimes more." This points to variety of origin and history; there is a tradition that Clifford's Inn was once an Inn of Court, and that one of its members was made a serjeant in Henry IV.'s reign, see A. R. Ingpen, Middle Temple Bench Book Introd. 2, 3.

[6] Bellot, L.Q.R. xxvi 384-399.

[7] 74 L.J. Ch. at p. 766.

to the Inner Temple. So far as one can trace, that affiliation only resulted in the appointment from time to time of Readers;" and he added that, though subject in some vague sense to the Inner Temple, "the sense in which they were subject is not at all easy to ascertain." There is much, therefore, to be said for Mr. Fletcher's conjecture that the four great Inns were "distinct from the earlier hospices," and were "the result of second thoughts, products of the time when the informal congregation of students in hired houses had proved a source of disorder, and, as at Oxford, the need of more discipline had become apparent."[1]

At the end of this period the four greater Inns were settled institutions. They had attained this position by various yet similar roads.

Lincoln's Inn.[2] The earliest authentic records of this Society —the Black Books—begin in 1422. Their varied contents describe the life of the Society; but they tell us nothing of its origin. It is already a settled Society when they begin with a fixed constitution and settled traditions. The Inn and the greater part of the site belonged originally to the see of Chichester. It was leased to the Society in 1422 at a rent of ten marks. In 1537 Bishop Sampson sold the property to William and Eustace Sulyard, from whom it descended to Edward Sulyard. He sold the property to the Society in 1580 for £520. This being the history of the property, it is difficult to account for the name "Lincoln's Inn," and the fact that for two centuries and a half the Society used the arms of the earls of Lincoln. In default of any direct evidence various conjectural solutions of the problem have been put forward. Mr. Baildon's theory[3] was that the Earl of Lincoln was the founder or patron of the Society "in another place;" that this "other place" was Thavy's Inn, situated opposite to the Earl of Lincoln's Inn; and that, the premises growing too small, the Society moved first to Furnivall's Inn,[4] and then to the Inn of the Bishop of Chichester, keeping, however, the name of its early founder or patron. This theory would no doubt account for the name of the Society, and for its connection with these two Inns of Chancery; but it has been proved not to be correct. Dr. Blake Odgers has shown that John Thavy, whose will, dated 1348, is supposed to prove that he was the owner or head of Thavy's Inn, has no connection with the apprentices of the law;[5] that the founder of Thavy's Inn was

[1] Pension Book, xiii, xiv.

[2] Black Books i Introd.; Registers i Introd.; Dugdale, Orig. Jud. clxiv.

[3] Black Books iv 263-297. [4] Dugdale, Orig. Jud. c. lxv.

[5] Essays in Legal History (1913) 243-249; Coke, 10 Rep. xxxviii, states that John Thavy left in his will, "Totum illud hospitium in quo Apprenticii *legis* habitare solebant;" but Dr. Blake Odgers has shown that the critical word *legis* is not contained in the will.

a Welshman by name Davy or Thavy; and that the site of this Inn was not conveyed to the governors of Lincoln's Inn till 1550.[1] Mr. Turner[2] and Dr. Blake Odgers[3] have suggested another theory, which is probably correct. It appears that in the middle of the fourteenth century there was a king's serjeant named Thomas de Lincoln, who owned a piece of property on the site of the present Furnival Street. This property was the earliest house of the Society of Lincoln's Inn. By three deeds of 1364, 1366, and 1369 the fee simple of this property was conveyed by Thomas de Lincoln to the Abbot of Malmesbury. He let it to the Society at a rent of £8; but a little later the rent was reduced to £4 on account of its ruinous condition. It was probably on account of the ruinous condition of the property that the Society moved into the house of the Bishop of Chichester. The date at which the removal took place was between 1412 and 1422. Till the former date the bishop was living in the house. At the latter date the Black Books show that the Society was in occupation. Thomas de Lincoln, the king's serjeant, having been forgotten, the name was accounted for by a wholly imaginary connection of the Society with Henry de Lacy, Earl of Lincoln.[4]

Gray's Inn. "That this House," says Dugdale, "had its denomination from the Lord Grays of Wilton, whose habitation it anciently was, there are none I presume that doubt."[5] The oldest records which we possess begin with the Pension Book of 1569; but there is an older volume, to which Dugdale had access, which is now lost. The exact period, therefore, when the apprentices of the law became tenants of the Inn is uncertain.

[1] "There was another and a very different man, John Davy, who in the year 1376 occupied the land which lay to the south of Holborn on the east side of John Thavy's land. . . . He was a Chancery clerk, Receiver for the king for the counties of Carmarthen and Cardigan, and a man of great prominence in Holborn from 1350 to 1397, when he died. The land which he occupied is quite distinct from that which John Thavy owned in 1348. . . . On this land there undoubtedly grew up, under the superintendence of Davy, a little school of law which was named after him—Davy's Inn—the property is referred to as 'Davy's inne' in an old inquisition post mortem in 1419, and in the ministers' accounts of the Bishop of Ely in 1444. On the 25th of January, 1550, Gregory Nicholas, citizen, quit claimed to Edward Gryffth and others gubernatoribus hospitii de Lyncolnsyn a 'messuage . . . commonly called Davyes Inne and of old time called Thavyes Inne with chambers in Holborn,'" ibid 245-246.

[2] The *Athenæum*, Sept. 22nd 1906, 334.

[3] Essays in Legal History (1913) 250-255.

[4] "As time ran on the King's serjeant was forgotten; no one remembered Thomas de Lincoln. . . . And men began to wonder why the Society was called Lincoln's Inn. . . . Some one must have recollected that there was an earl of Lincoln who was a famous man in the reign of Edward I., and who resided somewhere in this locality; possibly he was the founder of the Society. And in that uncritical age the suggestion soon found favour," Blake Odgers, op. cit. 253-254.

[5] Orig. Jud. c. lxvii; Pension Book xv, xxviii.

Probably the date was somewhere about 1370.[1] It is clear from the Paston Letters that the Society was the tenant of the Inn in 1454.[2] In 1456 Reginald de Gray granted the property to Thomas Bryan, a member of the Inn, and afterwards serjeant and Chief Justice of the King's Bench, and others in fee; and by deed of release Thomas Bryan became the sole owner. In 1493 it was transferred to Sir J. Gray of Wilton, R. Brudenall, serjeant-at-law, and others. In 1506 it passed to Hugh Denys and others; and in 1516 it was conveyed by them to Shene Priory. From 1516 to 1539 the Priory was the landlord of the Society. At the dissolution of the monasteries the property passed to the king, by whom it was granted in fee farm to the Society. Under an arrangement made in 1315 by John de Gray the convent of St. Bartholomew paid the Society £7 13s. 4d. for the provision of a chaplain; and this obligation passed to the king on the dissolution of the monasteries; on the other hand the Society owed the king £6 13s. 4d. as successor in title to the convent of Shene. "The Court of Augmentations balanced the debit and credit sides of the account by deducting a pound a year from the king's debt."[3] It is probable that Staple Inn and Barnard's Inn were attached to Gray's Inn in the middle of the fifteenth century.[4]

The Temple. The older records of the Temple, like the older records of the other Inns, have disappeared. The registers of the Inner Temple begin in 1505, and those of the Middle Temple in 1501, but they contain references to older records.[5] Though, as we shall see, we have little certain information as to the origin of the tenancy of the Temple by the lawyers, the history of the property is quite clear. On the dissolution of the Order of the Templars the property passed to the king, who granted it to Thomas, Earl of Lancaster. After his rebellion it passed successively to the Earl of Pembroke and Hugh Despenser. On the latter's attainder it passed once more to the crown. In consequence of a decree made at the Council of Vienna (1324),

[1] In 1589 Yelverton speaks of Gray's Inn as founded two hundred years ago at least, and he had access to MSS. now lost. There is a list of Benchers and Readers compiled by one Segar, the butler of Gray's Inn, in Charles II.'s reign, which takes the date back to 1355. The authenticity of this list is denied by Foss (Judges iv 273-278) and by Pulling, op. cit. 153 seqq.; Mr. Fletcher thinks that it is not wholly untrustworthy, as it is confirmed in some of its details by the Paston Letters, and by some published accounts of the churchwardens of St. Andrews of that date, Pension Book xxii n. 1.

[2] i 297. Billing refers to himself as a "felaw in Gray's In."

[3] Pension Book xxviii.

[4] Dugdale, Orig. Jud. cc. lxviii, lxix.

[5] Calendar of the Inner Temple Records i ix-xi; Middle Temple Records i 1, the first entry tells us that the late treasurer handed to his successor "the Book of the Constitution of the same place with the Rolls,"

the lands of the Templars passed to the Hospitallers, and Edward III. granted the temple to this body. Part of the property of the Templars lay inside the boundaries of the city of London, and part lay outside.[1] The latter part—the outer Temple—never came into the possession of the lawyers.[2] It was the former part which was let to them by the Hospitallers. That order was dissolved in 1539, and their property was vested in the crown. In 1609 the crown granted the parts of the Temple in the occupation of the lawyers to the two societies of the Inner and Middle Temple at a rent of £10 each.

The earliest mention of the tenancy of the Temple by the lawyers is in 1347, at which date the Hospitallers let part of it to the apprentices of the law.[3] Whether from the first the premises were occupied by two societies of lawyers, or whether they were occupied by one society which later divided, is wholly uncertain.[4] Mr. Bolland has found a reference to the Middle Temple as early as 1404;[5] and it is quite clear that the two societies of the Inner and Middle Temple were separate before the middle of the fifteenth century.[6] Perhaps, as Mr. Inderwick conjectures, the damage done by Wat Tyler suggested a convenient occasion for rebuilding and division. The division, however, was not thoroughly carried out. The two Temples still have their common church; and in 1630 it was stated, in the proceedings in a Chancery suit between the two Societies, that "the church, the buildings, lodgings, courts, ways, lanes, belonging to the Inner and Middle Temples are so intermixed that

[1] Blake Odgers, Legal Essays (1913) 236-237.

[2] "The portion of this land which lay to the south of the Strand became the property, first of the bishops of Exeter, then of Lord Paget, and later of the Earl of Leicester, and then of his stepson Robert Devereux, Earl of Essex. Upon it now stand Essex Hall, Essex Street, and Devereux Court. . . . The portion north of the Strand, formerly known as Fickett's Field, was, in the eighteenth century covered with a network of disreputable slums. These were later cleared away to make room for the stately pile of the Royal Courts of Justice," ibid 243; cp. Buc, "The Third University, etc." of England, appended to Stow's Annales (Ed. 1631) 1072, cited Inderwick, Calendar of Inner Temple Records lxviii.

[3] Dugdale, Orig. Jud. c. lvii.

[4] Blake Odgers, op. cit. 240-242.

[5] L.Q.R. xxiv 402—in the will of one John Bownt of Bristol a bequest is left, "Roberto mancipio Medii Templi."

[6] For the evidence of their original unity see above 495 nn. 3 and 4; the best evidence that they were divided by the middle of the fifteenth century is that of the Paston Letters; the evidence to be gathered from these letters is stated at length in the Inner Temple Calendar i xiv-xvii, and may be summed up as follows: in 1426 there is a reference to the "ostel du Temple bar;" in 1440 to "Your college the Inner Temple;" in 1443 to "the Inner Temple;" in 1445 to "the Inner In in the Temple;" in 1449 to "the Inner Temple;" in 1451 "the Mydill Inne," and "the Inner Inne" are both mentioned. It is noted in the Calendar i xvi that in a folio of the Black Books of Lincoln's Inn, which is not printed (44d.) the Middle Temple is referred to in 1442; cp. also Y.B. 3 Ed. IV. Mich. pl. 7 in which an account is given of a call of serjeants.

they can hardly be distinguished the one from the other."[1] There was no formal deed of partition till 1732.[2]

We cannot here go into the details of the separate constitution of these Inns. It will be sufficient to say that the governing body was then as it is now, the Benchers,[3] who possessed powers of education, discipline, and government over the members of the Inns very similar to those possessed by the fellows of an Oxford or Cambridge college.[4] The Benchers were presided over by a member or members of the governing body who were annually elected. Other annually elected members managed the finances of the society; while the Readers, assisted by the Benchers, were, as we shall see, responsible for the education of the members. In addition, there was a staff of paid servants, such as the butler, who, at Lincoln's Inn, did most of the clerical work and assisted in maintaining order, the steward, the cook, the manciple, the porter, and the laundresses.[5] Here we are chiefly concerned with the legal education given by the Inns of Court, and the effect which that education had upon forming the various grades of the legal profession.

The most authentic account of the system pursued is to be found in a statement made by Thomas Denton, Nicholas Bacon, and Robert Cary to Henry VIII. upon this subject.[6] It represents the grades of membership and the rules of study as well settled; and no doubt the information contained in it can be taken as applicable to our period. This statement deals with (i) the grades of membership within the Inns, (ii) the periods of study, and (iii) the mode of education.

[1] Calendar, Inner Temple ii App. viii.

[2] We may note that the author of a MS. of Charles I.'s reign (cited Inner Temple Calendar i xvii, xviii), the writer of which had access to documents which are now lost, believed in the original unity of the two Societies. "Since 1347," he says, "the professors and students of the common law have there resided, who in tract of time converted and regulated the same, first into one Inn of Court, and afterwards, viz. in the reign of Henry VI., divided themselves into these two Societies or Inns of Court, viz. the Inner and Middle Temple. That they were at first but one is apparent by all the records of that time, which make no mention but only of the Temple in the singular number, without any addition or distinction." At this time the lawyers "were so multiplied and grew into soe great a bulke as could not conveniently be regulated in one society, nor indeed was the old hall capable of containing so great a number. Whereupon they were forced to divide themselves. A new hall was then erected which is now the Junior Temple Hall. Whereunto divers of those who before took their repast and diet in the old hall resorted, and in process of time became a distinct and divided Society." His conjecture that the lawyers who colonized the Temple came from Thavy's Inn cannot now be supported, above 499-500; nor can Mr. Hutchinson's theory of a later colonization from this Inn, Minutes of Parliament of the Middle Temple i (7), (8).

[3] They meet in a Council at Lincoln's Inn, in Parliaments in the Inner and Middle Temple, in a Pension at Gray's Inn.

[4] See e.g. Black Books i viii, ix; Inner Temple Calendar i xli 46; Pension Book xli 78.

[5] Black Books i xiv-xxiii; Inner Temple Calendar i xxxi, xxxii.

[6] Printed by Waterhous, Fortescue Illustratus 543-549.

(i) The grades of membership.

The Benchers and Readers are those who have publicly lectured in the Inn. As we have seen, they rule the Society, and at their head is the Treasurer or Pensioner. It is from the Readers that the serjeants-at-law are usually appointed. Below them come the Utter-Barristers. They are "such that for their learning and continuance are called by the said Readers to plead and argue in the said house doubtful cases and questions which amongst them are called motes, at certain times propounded and brought in before the said Benchers or Readers, and they are called utter-barresters for that they, when they argue the said motes, sit uttermost on the forms, which they call the Barr;[1] and this degree is the chiefest degree for learners in the house next the Benchers; for of these be chosen and made the Readers of all the Inns of Chancery, and also of the most ancient of these is one elected yearly to read amongst them, who, after his reading, is called a Bencher or Reader. All the residue of learners are called Inner-Barresters, which are the youngest men, that for lack of learning and continuance are not able to argue and reason in these motes; nevertheless whensoever any of the said motes be brought in before any of the said Benchers, then two of the said Inner-Barresters sitting on the said forme with the Utter-Barresters, doe for their exercises recite by heart the pleading of the said mote case in Law French, the one taking the part of plaintiff, and the other the part of the defendant."[2]

These were the three chief classes of members of the Inns; but they were not all the members. In the first place there were the professional attorneys. It is clear that at this period attorneys were rapidly becoming a distinct professional class. The old distinction between the attorney and the pleader was still preserved;[3] and, though unprofessional attorneys were still legally possible,[4] they were coming to be more rarely employed. The increase in the number of professional attorneys made the need for regulating them pressing. It is not therefore surprising to find that attorneys for the purposes of legal business were becoming

[1] For another explanation of the terms "Utter" and "Inner" Bar see Black Books of Lincoln's Inn i x; in the Acts of the Privy Council xix 388 (1590) the term "owtward barryster" is used.

[2] The name "barrister" does not become a usual name till the sixteenth century, see L.Q.R. xxi 353, xxiv 398-401; but it appears in the Black Books of Lincoln's Inn i 26 in 1454-1455; the name "inner barrister" has long been superseded by the name "student," L.Q.R. xxiv 400.

[3] Above 311-312; Y.B. 12, 13 Ed. III. (R.S.) 102, 274.

[4] Y.B. 18 Ed. III. (R.S.) xxxviii, "There is nothing to show that a party could not nominate any one whom he might please to act for him. He might even nominate his wife;" cp. Bellot, L.Q.R. xxv 404, 405; and see Bebb v. The Law Society (1914) 1 Ch. 286.

officers of the court and as such subject to the control of the judges.[1] Thus in 1403 provision was made for the exclusion of ignorant attorneys. They were to be examined by the judges, and those whom the judges admitted were to be enrolled. The judges were also to have the power to remove them.[2] In 1452 the court of Common Pleas issued orders regulating their conduct.[3] These professional attorneys, thus admitted and controlled by the judges, were, during the earlier part of this period, allowed to plead their clients' cases in court[4] and, all through this period, to become members of the Inns. They may, perhaps, have been more numerous in the Inns of Chancery than the Inns of Court; but they might clearly be members of either.[5] They were not yet confined to the Inns of Chancery. In fact, there was as yet no clear division in these respects between the two branches of the profession. Attorneys and junior apprentices were classed together at this period, as in the reign of Edward I.;[6] and no doubt the junior apprentices, both at this period and later, sometimes acted as attorneys.[7] As the old legal distinction between the office of an attorney and the office of a pleader tended to grow more faint with the enlarged powers which litigants had of appointing attorneys, and with the rise of professional attorneys, it might well have happened that the distinction would have been obliterated. But we shall see that the differentiation of duties and functions which was springing up, and the different relation to the judges of these two branches of the profession, tended to supply new grounds for the perpetuation of the old distinction; and, in the following period, it was revived, and given its modern significance, mainly by the action of the Inns of Court and the

[1] See e.g. Y.BB. 11, 12 Ed. III. (R.S.) 586; 17, 18 Ed. III. (R.S.) 138-140; R.P. iii 642 (11 Hy. IV. no. 63); ibid 666 (13 Hy. IV. no. 49); iv 80 (3 Hy. V. no. 34); cp. Bebb v. The Law Society (1914) 1 Ch. 286.

[2] 4 Henry IV. c. 18; cp. 33 Henry VI. c. 7—a statute to diminish the number of attorneys in Norfolk and Suffolk; those allowed to continue were to be elected and admitted by the Chief Justices.

[3] Praxis Utriusque Banci 26.

[4] See e.g. Y.BB. 11, 12 Ed. III. (R.S.) 138, 206, 436; 12, 13 Ed. III. (R.S.) 2, 214, 304; 13, 14 Ed. III. (R.S.) 74; Select Cases in Chancery (S.S.) 79.

[5] It is not until the sixteenth century that attempts began to be made to exclude them from the Inns of Court, and then in terms which imply that they had formerly been members; thus in 1556 the Council of Lincoln's Inn ordered that "*From henceforth* no man that shall exercise th' office of Attornieship shalbe admitted into the feloship of this Howse wi'out the consent of vi of the Benche," Black Books i 315; in 1557 the judges made a similar order that attorneys should be excluded from the Inns of Court *from henceforth*, Dugdale, Orig. Jud. 310; Middle Temple Records iii; we shall see that these attempts did not succeed till the latter part of the eighteenth century, Bk. iv Pt. I. c. 8.

[6] R.P. iii 58 (2 Rich. II.) the legal profession is assessed as follows: Serjeants and Great Apprentices, 40s.; other Apprentices, 20s.; Apprentices of less estate and Attorneys, 6s. 8d.

[7] See Select Cases before the Council (S.S.) 50 for a case for the year 1365; and L.Q.R. xxv 405-406 for an instance for the year 1437.

judges in first discouraging and then excluding attorneys from call to the bar. The effect was to deny the attorney the right to plead in court for his client because, as we have seen, it was only the call to the bar of the Inn which could confer this right. In the second place, besides the apprentices and the attorneys, clerks of many different kinds could be members of the Inns.[1] We shall see that the clerks of the courts often served their apprenticeship to the law by combining the training given by the Inns of Court with the exercise of their duties in the offices of the courts. Both at this period and later these clerks sometimes acted as attorneys.[2] The fact that these officials were members of the Inns and resided there, affords an explanation of the fact that many of the offices of the courts were situated in these Inns.[3]

(ii) The periods of study.

The periods of what we may call "the academic year" were Learning Vacations, in Lent and summer; Term time;[4] and Dead Vacation. Of these periods the learning vacations were the most important.

(iii) The mode of education.

The mode of education may be summed up in two words, lectures and argument; and it was not dissimilar to the analytical and dialectical methods of instruction pursued at the Universities.[5] For the learning vacations the Benchers elected from among the senior Utter-Barristers a summer Reader. The same person often read during both the summer and the Lent vacations. The person selected was given half a year's notice to prepare his lectures. "Then the first day after Vacation, about eight of the clock, he that is so chosen to read openly in the Hall . . . shall reade some one suche Act or Statute[6] as shall please him to ground his whole reading on for all that Vacation, and that done, doth declare such inconveniences and mischiefs as were unprovided for . . . and then reciteth certain doubts and questions which he hath devised, that may grow upon the said statute, and declareth his judgement therein. That done, one of the younger Utter-Barresters rehearseth one question propounded by the Reader, and doth by

[1] Black Books of Lincoln's Inn i xiii.

[2] R.P. iii 306 (16 Rich. II. no. 28) there is a complaint that the clerks of the King's Bench, Common Bench, and the Assizes act as attorneys for the parties, and falsify the rolls in the interests of their clients.

[3] Vol. i 648; Inner Temple Calendar i xxviii, xxix.

[4] For the Terms and their origin see vol. iii App. VII.

[5] For a clear account see Mullinger, History of Cambridge, i 359-361.

[6] It will be observed that it is assumed that these solemn readings were upon some statute; but the extant readings show that this was not always the case, see Bk. iv Pt. I. c. 5 for a list of readings in print or MS. or referred to by legal writers.

way of argument labour to prove the Reader's opinion to be against the law, and after him the rest of the Utter-Barresters and Readers, one after another in their ancienties, doe declare their opinions and judgements in the same; and then the Reader who did put the case endeavoureth himself to confute objections laid against him, and to confirm his own opinion, after whom the judges and serjeants, if any be present, declare their opinions, and after they have done, the youngest Utter-Barrester again rehearseth another case, which is ordered as the other was. Thus the reading ends for that day: and this manner of reading and disputations continues daily two hours or thereabouts." These were the solemn readings; but work was not over for the day. After dinner, cases put at the Readers' table were argued throughout the Hall; and every night after supper, "and every fasting day immediately after six of the clock," the Reader and the Benchers discussed cases put by one of the Utter-Barristers. That done, they held a moot. The Benchers acted as judges, and two Inner-Barristers and two Utter-Barristers acted as counsel. That these readings and the discussions which followed them at moots and otherwise were serious contributions to legal knowledge can be seen from the fact that they were cited in argument in the courts.[1] In the Inns of Chancery the reader was an Utter-Barrister of the Inn of Court to which the Inn of Chancery was annexed. There a very similar procedure was followed.[2]

In term time cases were argued after dinner, and moots were held after supper; and even in the dead vacation the same course was followed, the Utter-Barristers then taking the place of the Benchers.[3] This being the mode of education, we can see how important it was that not only the students, but also the Utter-Barristers and Benchers should "keep their vacations." Numerous rules were made to ensure this—indeed, to have kept so many vacations was, in the case of the students, a condition precedent to a call.[4] Utter-Barristers and Benchers were liable to a fine and other penalties.[5]

It is not surprising that law schools conducted after this fashion made "tough law."[6] The training which they gave was

[1] Dyer 2b note; Plowden 63.

[2] In Y.B. 37 Hy. VI. Hil. pl. 4 there is an allusion to the moots in the Inns of Chancery, "Ceo este la forme de pleading en Inns de Chancery; mes la forme n'est bon."

[3] Cp. Black Books of Lincoln's Inn i ix-xi, xxiv-xxvii.

[4] Ibid i 12, 41-43.

[5] Ibid i 263, there is an order of 1563 that "No Utter Barrester shalbe allowed to have any boyer pot, or clerke to sytt in comens, onless the same Utter Barrester gyve his diligent attendauns att all lernyngs, and especially yn the lernyng vacacyons, aswell within this Hous as att Chancery mootes."

[6] Maitland, English Law and the Renaissance 27, 28, "Now it would, so I think, be difficult to conceive any scheme better suited to harden and toughen a traditional

intensely practical, and no doubt it kept the practical, the argumentative, the procedural side of law prominently to the front—perhaps sometimes to the exclusion of legal theory. It produced the men who wrote the Year Books—the men who made the common law a system of case law. At the same time we cannot say that it gave no opportunities for instruction in legal theory. It also produced Littleton and Fortescue. We may conjecture that the students had some opportunities for "private reading," perhaps in the chambers of the elder lawyers;[1] and to those whose minds are prepared by such reading suggestions thrown out in argument, and the quick play of mind upon mind, will often give hints as to the existence of difficult problems and clues to their correct solution. Moreover, we may remember that this mode of instruction, if it began by making men pleaders, and continued by making them advocates and keen debaters, ended by making them judges. The Benchers in the learning vacations and in term time were the judges in the moots, and the Utter-Barristers in the Inns of Chancery, and in the Inns of Court in the dead vacations, played the same part. Thus the education provided by the Inns was a constant rehearsal and preparation for the life of advocate and judge. All were learners in their various grades. A call to the bar was but an inception. The Utter-Barrister must still learn of the Readers and Benchers as well as assist to teach by the part he took in readings and moots. The learning of the "ancients" was kept fresh by the queries and the difficulties of the inner bar. Even the Benchers themselves were, as compared with the serjeants and judges, but apprentices in the law.[2]

(3) The relation of the Inns of Court to the Serjeants and Judges.

The serjeants and judges were, as we have seen, the rulers of the profession of the law. They formed a gild of their own; and the member of an Inn who became a serjeant ceased to belong to the Inn. On his departure a presentation was made to him, and his former colleagues prayed him always to bear in mind the interests of his old society; and he in turn thanked the society, "gevynge a gret lawde onto the maners of the house wher thorough they have atteynid to ther kownyng and promocyon."[3] Though the Inns were independent societies,

body of law than one which, while books were still uncommon, compelled every lawyer to take part in legal education, and every distinguished lawyer to read public lectures;" see ibid 89, 90 for Sir Thomas Smith's appreciation of the qualities of the "Londinenses Jurisconsulti."

[1] In Y.B. 11 Ed. IV. Trin. pl. 4 Genney speaks of "Mon master Cheine."

[2] Black Books of Lincoln's Inn i xxxix note.

[3] Dugdale, Orig. Jud. cc. xliii-xlvi. The following extract, taken from c. xliii, will give some idea of the common forms of address on such occasions. The

they had probably, as we have seen,[1] gained their powers by the goodwill of the judges; and they still remained liable to obey the reasonable orders issued by the judges, who exercised in later days, and probably from the earliest period, a sort of visitatorial jurisdiction.[2] It is but rarely that we hear of any objection made to these orders;[3] for as a rule they only contained regulations affecting the education, the conduct, the behaviour, and the qualifications of the members of the Inns. They did not interfere with their peculiar customs and their internal ecomony; and they were sometimes made with the consent of the Benchers.[4] Their old societies did not forget their former members who had become judges and serjeants;[5] nor did the judges and serjeants forget their old societies—indeed, they sometimes continued to reside within their walls.[6] They were ready to assist them if appealed to;[7] and they sometimes gave dignity not only to the Reader's feast, but also, in the fifteenth and sixteenth centuries, to his reading.[8]

(4) The Legal Profession and the Law.

The education, the discipline, the whole life of the Inns of Court was collegiate in the best sense of the word. The picture of the conditions of life within their walls drawn by the earliest records is strikingly similar to the modern conditions of collegiate life at Oxford or Cambridge. We are not therefore surprised to find that they attracted students who had no thought of becoming

occasion was the creation of three serjeants from the Middle Temple in 1504; one of the members of the Inn spoke, praising the serjeants, "pro suo bono gestu et bona gubernatione, quæ fuerunt causa electionis eorum, desiderando eos habere societatem in eorum favorem, etc. . . . Et tunc Thesaurarius deliberat eis xx marcas in auro et argento, inclusas in nova cyroteca; quibus acceptis regratiebantur Societatem, non solum pro pecunia, sed pro aliis beneficiis, ut erudicione legum et legatione eorum ad studendum per bonas regulas ordinatis per Comitivam, quæ restrixerunt eis in juventute ab insolentia ad studendum," etc.

[1] Above 496-497.

[2] Dugdale, Orig. Jud. c. lxx.

[3] Ibid 314, 315. We hear sometimes of objections; the Society of Lincoln's Inn promises only a qualified obedience to the orders of the judges issued in 1594; in 1559 the same society declined to enforce an order of the judges forbidding the wearing of beards, Black Books i xxxvi, 328, 329.

[4] Dugdale, Orig. Jud. 316, notices that such assent is given to the orders of 1596.

[5] Black Books i 152, "Nov. 30, 1508. Granted by the Governors and all the Benchers, to Robert Reede, knight, Chief Justice of the Common Bench, for the love that he has for the Inn, that whenever the office of Butler to the Inn shall become vacant, the said Robert shall nominate whom he pleases to the said office." This is the Sir Robert Reede "who endowed lectures," see Maitland, English Law and the Renaissance 1-3.

[6] E.g. Coke in the Inner Temple.

[7] Inner Temple Records i xlv—a dispute as to seniority, the object being to escape reading; Black Books i 43, 44—the latter entry is an order made by some of the judges and serjeants that the Benchers from their call to the Bench till their first reading shall keep the Autumn and Lent Vacations.

[8] Above 507.

professional lawyers. Both Fortescue and the Paston Letters testify to this fact. Indeed, there was a two-fold reason why this was so. In the first place, they gave a first-rate technical training in the law; and, in this litigious age, such a training was absolutely necessary to those who had property to protect. "Thynkk onis of the daie of youre faddis counseyle to lerne the lawe," wrote Agnes Paston to her son Edmund at "Clyffordis Inn" in 1445, "for he seyd manie tymis that ho so ever schuld dwelle at Paston schulde have nede to conne to defende hymselfe."[1] In the second place, the Inns gave, as the two older Universities to-day give, a moral and a social as well as an intellectual training. "Religion and morals," says Mr. Fletcher,[2] "were cared for as well as learning; and the younger men did not lack the social training which was to be acquired from daily association in an atmosphere of good fellowship and respect for authority with others of their own standing. The members lived to a great extent in community. In the Hall they met for breakfast, dinner, or supper, as well as for lectures and disputations. In the chapel they assembled for common prayer and the Holy Communion. At Christmas and sometimes at other seasons they shared both in the labour and the expense of presenting masques and plays in the Inn or at Court."

Much of the fabric, and many of the possessions of the Inns, are standing proofs of the patriotism of their members. They subscribed to add to or to beautify their buildings.[3] They willingly gave their services.[4] They remembered their societies by gifts in their lifetime or after their death.[5] Men imbued with this spirit, and highly trained in the theory and practice of the law, afforded the best material from which to select the serjeants and the judges. They came to the practice and the administration of the law with high ideals as to the greatness of their calling—with much of the spirit of the Roman lawyers who defined jurisprudence as "divinarum atque humanarum rerum notitia, justi atque injusti scientia." "The law," says Fortescue,[6] "is a holy

[1] Paston Letters i 58, no. 46.

[2] Pension Book, Gray's Inn xxxii.

[3] See Dugdale, Orig. Jud. 146, as to the building of the kitchen of the Inner Temple in Mary's reign; ibid 188 as to the building of the Hall of the Middle Temple; Black Books ii vi-viii as to the building of the new chapel at Lincoln's Inn.

[4] Dugdale, op. cit., tells us that Plowden acted as Treasurer for the building of the Middle Temple Hall.

[5] Black Books i 136 (1505), "John Nethersale, late one of the Society, from the goodwill that he had to the Society, gave and left 40 marks that the Society might build or newly erect the library within the Inn;" ibid iii 453 for Hale's bequest of his books and MSS. to the Library; ibid iv 369-374 for the plate presented at different periods to the Inn.

[6] De Laudibus cc. 3 and 4; cp. Y.B. 24 Ed. III. Pasch. pl. 22, "La Ley est reason et equitie a faire droit a touts et a saver chescun home de meschief entant come il puit."

sanction or decree commanding those things that be honest, and forbidding the contraries;" and again, "Man's lawes are nothing else but certaine rules whereby Justice is perfectly taught." There will be, perhaps, some danger that the law thus technically learned will become more and more esoteric; and that appreciation will develop into an uncritical complacency. But this mode of training will tend to preserve the old idea that law is essentially a rule of conduct binding all members of the state, rulers and subjects alike, and will thus maintain in the common law and the common lawyers that boldness in the face of authority which has always been the chief bulwark of our constitutional liberties. And, as in the wider sphere of politics the self-government of the independent local communities trained the nation at large in the duties and responsibilities of citizenship, so, in the narrower sphere of the legal profession, these independent, self-governing Inns of Court trained the legal profession in those high standards of professional honour which have given to it its monoply of the knowledge and the practice of the law. The serjeants were selected, no doubt, by the crown; but they were selected on the advice of the judges. They were sworn to serve truly the king's people; and their monoply of practice was in the court of Common Pleas. The cause of legal knowledge was not advanced when, in later times, the Inns of Court lost their collegiate existence, ceased to educate their members in the law, and retained only the exclusive privilege—gained in the days when they were efficient educational bodies—to admit their members to practise in the courts. Even in the twentieth century those of us who have at heart the cause of legal education may learn something, many educational bodies both in the New and the Old World have already learnt something,[1] from the methods pursued by these societies, and by the gild of the serjeants and the judges, in the fourteenth and fifteenth centuries. The control over the education in, and the practise of the common law was entrusted to them; and the work they did in completing and developing the system which they had inherited, proved them to be no unworthy successors of the great kings and statesmen of the twelfth and thirteenth centuries. These kings and statesmen had, by checking the disintegrating tendencies of feudalism, given us our common law. The legal profession so strengthened its fabric by the mode in which they practised and taught it, that it was able towards the end of the sixteenth century to take new life, and, in the seventeenth century, to contend successfully with the rival

[1] See L.Q.R. xiv 416 seqq. for a description of the moot system as practised at Harvard; and both at Oxford and Cambridge the system is now vigorously practised.

systems of law administered in the Council, the Chancery, and the Admiralty.[1]

We must now turn to the materials used by the legal profession in their work.

The Register of Writs[2]

The common law had, as we have seen, grown up round the royal writs. These royal writs had superseded those older forms of action and older methods of procedure which had been universal before the victory of royal justice. They and the procedure based upon them were, as Maitland has said, to that older procedure what the formulary procedure of Roman law was to the Legis Actiones.[3] They formed the ground plan upon which the builders of the common law worked;[4] and it was for this reason that the learning of writs was the first thing taught to students of that law.[5] Seeing that the choice of a wrong or inappropriate writ meant loss of the action,[6] this learning continued to be of the utmost importance to the practitioner all through his career. In this period these writs were, as a parliamentary petition of Edward III.'s reign describes them, "the chiefest part of that law which is the sovereign law of king and kingdom."[7] Even in later times, when the building constructed upon this design has been so altered and extended that the original design has been almost lost sight of, the ever-growing fabric of the common law still retains in its main outlines clear marks of the character of that design; for these writs had given birth to the forms of action; and, though "we have buried these forms of action, they still rule us from their graves."[8]

It is for these reasons that it is true to call the Register which contained these writs the oldest book of our law. All through this period the common law was grouped round the writs contained in it; and it grew up gradually with the growth of the

[1] This was for the first time clearly shown by Maitland in his English Law and the Renaissance.

[2] The chief authorities are the Register itself; three articles by Maitland in the H.L.R., now reprinted in his Collected Papers ii 110-173, and his lectures on the Forms of Action printed in his volume on Equity; see also Reeves, H.E.L. iii 437-441.

[3] Forms of Action 313.

[4] "The scheme of original writs is the very skeleton of the Corpus Juris," H.L.R. iii 97; Coll. Papers, ii 110.

[5] Above 498 n. 3.

[6] "It seems that this writ is a mixture of two writs which are of different natures, and therefore it is contrary to law," Y.B. 2, 3 Ed. II. (S.S.) 90, 91.

[7] R.P. ii 241 (25 Ed. III. no 40); cp. Diversité des Courtes (ed. 1561) f. 117, "Nota que les briefs sont les principals et premier choses en nostre ley;" for this tract see below .

[8] Maitland, Forms of Action 296.

law. "To ask for the date of the Register," says Maitland,[1] "is like asking for the date of English law. In age after age chancellor after chancellor has left his mark upon the Register. There is work of the twelfth century in it, there is work of the fifteenth century, perhaps of the sixteenth."

We have seen that it is to Henry II.'s reign and to Glanvil's treatise that we must look for our earliest settled form of writs. In spite of Coke's assertion to the contrary, it is not probable that there was an official register in his day.[2] However that may be, we see in his book the names and the forms of the writs which will, in later days, appear in the Register—sometimes with but little alteration. "We find," says Reeves, "the writs of novel disseisin and of mort-dauncestor as given by that author correspond exactly with those in the Register, in the scope, substance, and words; . . . on the other hand, the writ of right of advowson, though it agrees in the main of it with that in the Register, is not *verbatim* the same. The *assisa ultimæ presentationis* differs only in a few words, the writ of debt is *verbatim* the same, except that instead of alleging the *detinet*, it says *injuste deforceat*. These are a few out of the many observations that might be made on a comparison of the writs in Glanville with those in the Register."[3] A reference to the Appendix will show that these words of Reeves are true as to the names and the substance of many writs in the Register.[4]

We have seen that the thirteenth century was the period in which the mediæval common law was developed and, in its main outlines, completed. It left its mark upon the Register. There are a large number of MSS. of the Register of different periods at Cambridge, in the British Museum, and elsewhere. Not only lawyers, but large landowners, especially religious houses, kept copies of the Register, just as they kept copies of legal text-books and statutes. The age was litigious; and landowners were obliged to have many dealings with the law, not only in the character of litigants, but also in the character of persons entrusted with its administration. Some of these MSS., summarized by Maitland, illustrate the gradual growth of the Register. The register summarized in Appendix VB, which comes from the early years of Henry III.'s reign, shows a distinct advance on Glanvil's treatise; that summarized in Appendix VC, the date of which is

[1] H.L.R. iii 98, Coll. Papers, ii 112. The first printed edition was published by Rastell in 1531; it was republished by Tottell in 1553; in 1595 there was another edition published by Jane Yetsweist; the fourth and last edition was published by the assigns of Richard and Edward Atkins in 1687, together with an appendix of writs used in the Chancery, and Theloall's "Digest of Original Writs and things concerning them;" my references are to this edition.

[2] Above 194. [3] H.E.L. iii 437. [4] App. VA.

probably about the year 1260, is nearly twice as large as the last-named register; while that summarized in Appendix VD, which comes from the early years of Edward I.'s reign, is yet larger, and the arrangement is coming to be in substance the arrangement of the printed Register. Similarly, in the later registers the arrangement and the verbal correspondence with the printed Register grows closer.[1] The writs contained in the Old Natura Brevium[2]—a tract of Edward III.'s reign—with the exception of the writ of Intrusion, agree exactly with the writs in the printed Register.

Maitland infers from these MSS. that the legal activity of the thirteenth century had left the Register in some disorder.[3] "Then came a chancellor, a master, a cursitor, with organizing power." The Register was put into something like the shape we know perhaps by the end of Edward I.'s, certainly by the end of Edward II.'s reign.[4] Dugdale tells us of a new register compiled by Hengham;[5] and in 1338 a Year Book mentions a new register.[6] At the end of the fourteenth century we get the arrangement of the printed Register. During the course of that century many new writs were added, and cases were noted up. Parning[7] was chancellor, October, 1341, to August, 1343. His name often occurs in connection with new writs.[8] The traces left during the reigns of the Lancastrian kings were slight; and those left during the reigns of the Yorkist and Tudor kings still more slight. The Chancery and the common law courts were becoming more distinct from one another at the end of this period than they were at the beginning; and the increasing separation which was taking place between these departments of government made for fixity of arrangement. Moreover, the increased control over the Register which the common law courts exercised at the later period made for fixity in the forms of the writs themselves. In Edward II.'s reign, a chief justice who had quashed a writ was sent for to explain his action to the clerks of the Chancery;[9] and on another

[1] App. VE.

[2] Reeves, H.E.L. iii 438. For this tract see below 522; for the list of writs contained therein see App. VG.

[3] H.L.R. iii 217, 218, Coll. Papers, ii 164.

[4] Ibid 218, 219; see ibid 221-223 for a MS. of Richard II.'s reign divided into chapters, Coll. Papers, ii 167-170.

[5] Orig. Jud. 56, citing a MS. in the Cottonian Library.

[6] Y.B. 11, 12 Ed. III. (R.S.) 646, "Simile breve in fine registri novi."

[7] His real name was one in which Dickens might have rejoiced, i.e. "Peruinke," or "Periwinkle," Y.B. 18 Ed. III. (R.S.) xxxvii; for more concerning him see below 558.

[8] Register ff. 13b; 131b, "per Pernyning;" 136, "Anno 16 R.E. 3 Pernyning cancellarius concessit breve de attornato pro defendente in brevibus de computo sicut pro querente;" H.L.R. iii 223, 224.

[9] Y.B. 3 Ed. II. (S.S.) 19, "And afterwards Stephen (the plaintiff) complained in the Chancery that his writ was abated. The clerks of the Chancery caused Bereford,

occasion the same chief justice and the masters in Chancery together amended the form of a writ.[1] In Edward III.'s reign the judges still speak with the council as to the mischief attending the issue of writs,[2] and they still consult with the Chancery as to the form of the writs.[3] In Edward IV.'s reign it is the masters who are sent for by the court of Common Pleas and ordered to advise as to the form of a writ; and it is stated that the fixed Chancery form is the legal form which must be maintained.[4] Probably Henry VI.'s reign was the latest period in which any one went through the Register to add new writs in their appropriate places.[5] The blanks left at various places in the MS. of Henry VI.'s reign, described in Appendix VE, would seem to suggest that the maker of this MS. left these blanks with a view to the insertion of new writs at a later date in their appropriate places. If this is so, the detailed arrangement of the printed Register would depend largely on the accidents of the MS. which went to the printers in the sixteenth century.

A reference to Appendix VF will show that the writs in the printed Register fall into groups. Under each group are placed not only the writs belonging to that group, but also various subsidiary or judicial writs formed to meet cases begun by one of the original writs.[6] Some of these writs occur again in the very miscellaneous group to be found at the end of the Register. It is by looking at the contents of these groups and the order in which they succeed to one another that we shall best understand both the manner in which the mediæval common law has grown up, and the links between its parts which appeared to be natural to the lawyers of those times. As we have seen, and as the Register shows, many familiar landmarks disappear when we look at the legal landscape through mediæval spectacles.

C.J., to come, and demanded of him why he quashed the writ. He said that it was not maintainable by statute," etc.; for another case in which Bereford, C.J., quashed a statutory writ which did not follow the form provided by the statute, see Y.B. 5 Ed. II. (S.S.) 95; it is possible that the Chancery clerks had, as Scrope said *arg.*, a wider discretion in the wording of common law writs.

[1] Y.B. 3 Ed. II. (S.S.) 109. [2] Y.B. 17, 18 Ed. III. (R.S.) 12.

[3] Ibid 80.

[4] Y.B. 4 Ed. IV. Hil. pl. 4, the judges were hesitating as to the form of a writ of error; *Markham*, C.J., said, "Si la forme soit issint, donques cel course fait un ley coment que ore per case reason voille le contrary, mes ne purromes changer cel course a ore car sera inconvenient;" the masters in Chancery were then sent for to the Exchequer Chamber and questioned, "et les Justices diseront les Masters avant dit de aler en le Chancery et a communer ove lour compaignons issint que nous averons certain connusance de la course en cest cas."

[5] H.L.R. iii 223, Coll. Papers, ii 170; there is a precedent of a writ dealing with ecclesiastical matters dated 38 Hy. VI. inserted in its proper place at f. 58; but trespass on the statute 8 Hy. VI. is inserted, not among writs of trespass, but at f. 289 in the miscellaneous group at the end of the book; the best evidence of this is a comparison of App. VE with App. VF.

[6] This characteristic appears in Glanvil, App. VA.

The details of the contents and the arrangement of the Register in its final form will be found in Appendix VF. The following remarks upon its various groups are in the nature of an explanation and a commentary.

(1) The Writ of Right group comes first. The position of this group at the head of the Register dates from the days of Glanvil. The reason for its position is the fact that jurisdiction over land held by free tenure was one of the earliest as well as one of the most important of the branches of jurisdiction acquired by the royal courts. (2) Similarly, the Ecclesiastical Writs take in the Register, as they took in Glanvil's treatise, the second place. Here again we must probably look for an explanation to the fact that ecclesiastical questions were burning questions in Henry II.'s reign, and gave rise to much litigation all through this period. In the Register, however, all or nearly all of the ecclesiastical writs are grouped together. Thus the assize Utrum is placed in its natural position with these writs, and is not placed, as it is in Glanvil's treatise, with the possessory assizes. (3) Next come the writs connected with waste. The reason why these writs come next is, Maitland thinks,[1] because proceedings for waste were originally based upon a royal prohibition against waste; and "prohibition" had an ecclesiastical, or perhaps we should say an anti-ecclesiastical, note about it. (4) Next comes the group relating to personal liberty and pecuniary obligation to the state. As early as the reign of Henry III. the group relating to personal liberty, beginning with the writ "de homine replegiando," followed the writs connected with waste.[2] This group has attracted others to it. The replevin of a prisoner naturally connects itself with the replevin of cattle. The writs connected with villein status are also allied. But replevin has suggested distraint; and distraint suggests legal process. Men may be distrained for many different obligations to pay money; and they are usually amerced at one stage or another in an action. Hence we find in this group such writs as the "de auxilio" and "de scutagio habendo," and "de moderata misericordia." (5) The position of the group of writs dealing with criminal or quasi-criminal liability was settled at the end of the reign of Edward I., or sometime in the reign of Edward II.[3] The writ "de minis" had, under an old arrangement, followed the liberty group, and preceded the writs relating to criminal appeals. Writs of trespass took the place of these writs relating to criminal appeals, as actions of trespass had in practice superseded the appeals themselves. The action of trespass, like the appeal, had its criminal side.[4] We naturally, therefore, find with

[1] H.L.R. iii 100, Coll. Papers, ii 115.
[2] App. VB.
[3] H.L.R. iii 218, 219, Coll. Papers, ii 165.
[4] Above 365.

it the writ "de odio et atia,"[1] the writ of conspiracy, and the commission of oyer and terminer[2] and documents connected therewith. (6) The action of trespass had also its civil side—it was a personal action in tort. It is natural, therefore, to find that the writs in this group continue to deal with personal liability. Thus we get the writs of account, debt, and detinue. The fact that executors and administrators may be made liable in these actions leads to the insertion of certain writs given to a wife or children to enforce their claims to a deceased person's property, and writs exonerating certain persons from liability for the deceased's debts. A return is made to the proper subject of the group in the writs relating to Statutes Merchant and Statutes Staple. (7) The next group, it will be seen, deals with a number of very miscellaneous rights in connection with the land law. Many personal obligations, as we should now consider them, in relation to the land could be enforced by special kinds of real actions formed to meet them.[3] This very miscellaneous group in the Register is a striking illustration of this fact. (8) The next group consists of Writs of Covenant. As we have seen, writs of covenant were, in Edward I.'s day, more often than not brought to enforce some agreement relating to land, or for the purpose of levying a fine. This, it would seem, is the connecting link.[4] (9) Writs of Dower follow—we are still considering rights connected with real property. (10) The next group, "Brevia de Statuto," is simply a miscellaneous mass of writs of all dates, chiefly relating to matters of public law. A return is made to the land law in the next three groups (11, 12, and 13), which deal chiefly with the possessory assizes, the writs of entry, and writs of formedon. The last writ of group (11) is the writ "ejectio firmæ;" the first writ of group (12) is the writ of entry "ad terminum qui præteriit;" and this affords a natural transition. (14) The last group, again, is a miscellaneous mass of the most various documents, generally of an administrative kind. Some of these have already appeared in the earlier groups.

The arrangement of the printed Register seems at first sight very arbitrary. Like many of the rules of the common law, it can be explained on no one principle. As Maitland points out, logic, convenience, chronology, chance, the *vis inertiæ* of the Chancery, have all played their part.[5] If we look at Glanvil's

[1] Bk. iv Pt. II. c. 6 § 3. [2] Vol. i 274.

[3] Above 355-356; vol. iii 28; H.L.R. iii 217, Coll. Papers, ii 162, "There is an important connection between an action in which a surety sues the principal debtor (*de plegiis acquietandis*) and an action of Mesne, in which the tenant in demesne sues the intermediate lord to acquit or indemnify him for the action of his superior lord; this connection we miss if we stigmatize Mesne as a real action just because it has something to do with land. The action of Debt, again, is founded on a *debet;* but so is the action for customs and services, at least in some of its forms."

[4] Above 367. [5] H.L.R. iii 99, 101, Coll. Papers, ii 112-116.

list of writs and compare it with the arrangement of the printed Register, we can see that some features in that arrangement have been very permanent. Both begin with writs of right, both go on to deal with ecclesiastical writs, and both place the possessory assizes towards the end. But we cannot expect to find any very definite or permanent arrangement in a book which was constantly growing by the aid of new statutes, orders of the council, the exigency of litigants, and the ingenuity of the chancellor, the masters in Chancery, the cursitors,[1] and the legal profession.

Another cause which accounts for its want of definite arrangement is the heterogeneous character of its contents. It is a register of writs and something more. Scattered throughout the book are notes of cases having reference to the writs,[2] names of masters or chancellors who sanctioned the writs,[3] notes as to the authority by which the writs were issued,[4] memoria technica for a learner's use,[5] sometimes a quære as to the validity of a given writ.[6] The writs themselves are no blank forms. The names in some of them recall to us the outside world of history.[7] In the MS. Register of Henry VI.'s reign[8] there is an elaborate letter of Request asking all principalities and powers to treat well an earl of Warwick; and this, as Mr. Stevenson tells me, is that Richard Beauchamp, Earl of Warwick, who in 1408 set off upon his adventurous journey to the Holy Land. Even where no names are mentioned the variety of detail shows us that we are dealing with real cases. This feature is, as we might expect, specially marked in the writs of trespass. Once, in a precedent of a writ "de minis," we get a glimpse of contemporary views as to conjugal relations. The husband may not beat or ill use his wife unless he is acting reasonably and lawfully in the

[1] For the masters and cursitors see vol. i 416-421.

[2] E.g. f. 76, "Nota tiel briefe [Waste] fuist tenus bon termino Hil. anno Ed. tertii 45;" 78b; 93-136b—such notes occur on nearly every page. See especially f. 54b a critical note as to the action of the judges in refusing writs of consultation.

[3] For Parning see above 514 n. 8; Knyvet f. 77; Newenham ff. 108, 108b; Everwyck f. 78b.

[4] "Per consilium," ff. 64, 124b; "de gratia speciali," f. 131; "Ceux briefs fuerent enseales per touts les sages de la Chancery, per assent des serjeants le Roy et autres sages asses [*qu.* aussi]," f. 131b; "Ista clausula . . . non continetur in statuto sed additur per quosdam jurisperitos," f. 269; "Tamen nota quod anno 11 Edwardi tertii les Maistres de la Chancerie ne voudrient agreer a cest clause, car ils disoient que cel serroit encounter la cours de la Chauncerie," f. 121b.

[5] ff. 2, 199.

[6] E.g. f. 76b—a case has been cited in which a writ has been upheld, "Tamen," says the annotator, "dicitur in eisdem placitis quod hujusmodi breve non jacet pro tenente per legem Angliæ. Ideo quære inde."

[7] f. 184b—a writ, "Ne quis occasionetur pro re facta in prosecutione Hugonis le Dispenser."

[8] App. VE; the writ is at f. 17b; in this Register names are more often given than in the printed Register.

cause of discipline.[1] This variety is probably due to the fact that in the Middle Ages there was no one official register. Each master or cursitor may have had his copy which he annotated, which his successor perhaps inherited.[2] From another point of view, too, the book is more than a mere register of original writs. The writs by which proceedings can be taken from other jurisdictions to the courts of common law are very numerous. It also contains many administrative documents of the most varied kinds. A letter to the Count of Flanders asking him to do justice to an English merchant, forms of grants, of pardons, of appointments to benefices, oaths to be taken by officials, documents connected with Exchequer business.[3] The contents of the Register illustrate not only the living and growing character of English law, but also the close connection of the law courts and the law with all departments of government, and the firm control which it maintained over local jurisdictions.

We may be tempted to compare the Register with the Prætor's edict, or, at least, with those parts of it which contained the forms of action. But at Rome each Prætor, though controlled by professional opinion, was himself solely responsible for the additions to his edict which he called by his own name. We have no such thing as an *Actio Publiciana* or a *Stipulatio Aquiliana*. At most there is an insignificant note that Parning or Knyvet or some other first sanctioned this writ. We may learn something from this difference. The Register was not made by a succession of individual officials. It was the book partly of an office—the Chancery—partly of the profession of the law. It is far more analogous to those official books of other offices, such as the Admiralty and the Exchequer, in which the practice and wisdom of the office were inscribed.[4] It has the same varied contents, and it answered a somewhat similar purpose. But the analogy is not complete, because, as we have seen, its contents were controlled by the legal profession. The Chancery issued the writs; but the judges

[1] f. 89—"Quod ipse [the husband] prefatam A [the wife] bene et honeste tractabit et gubernabit ac damnum et malum aliquod eidem A de corpore suo, *aliter quam ad virum suum ex causa regiminis et castigationis uxoris suæ licite et rationabiliter pertinet*, non faciat nec fieri procurabit quovis modo;" for the more modern view see Reg. v. Jackson [1891] 1 Q.B. 671, 679.

[2] H.L.R. iii 103; Coll. Papers, ii 119, and f. 6b (there cited). As Maitland says (Parlt. Roll 1305 (R.S.) xi, xii), "In the old record offices the line between public and private property was not always a very sharp line; there were many documents such as calendars and indexes, which, not being 'records' in the strict sense of the term, were deemed to belong to the keeper, though an incoming officer was practically compelled to purchase them from the executors of his predecessor;" we may perhaps apply this to the copies of the Register in the hands of the masters and cursitors.

[3] App. VF.

[4] Above 224.

might quash a writ which they deemed to be inconsistent with legal principle; and the importance of the Register is immeasurably greater than that of any of these other official books, because it governed the practice, not simply of an office, but of the common law—it defined the rights not of a class, but of all Englishmen.

The growth of the remedies given by the common law, and of the judicial machinery by which they were made effectual, can clearly be seen in the large variety of original and judicial writs of many various dates contained in the Register. But, as we have seen, in the course of the fifteenth century, the Register had ceased to expand. It is a significant fact that it contains comparatively few precedents of writs for beginning actions of trespass on the case, and no distinction is drawn between trespass and case. There are only a few writs for beginning actions of assumpsit;[1] and of these only two are for non-feasance.[2] In truth, the spread of the action of trespass and its offshoots was destroying the old scheme of personal actions;[3] and we shall see that at the end of this period there are signs that it was beginning to encroach upon the sphere of the real actions.[4] The old order was changing; and the book of the old order was gradually ceasing to be the heart and centre of the law. As Reeves says,[5] "The revolution which had begun to take place in the methods of redress . . . rendered great part of this famous volume obsolete before the world was put in possession of it, and the current has ever since set so strong the same way that, at this time, the Register is reduced to a piece of juridical antiquity." This statement is probably a little exaggerated. We may remember that the Register, because its forms are so numerous and so detailed, may still be of use to elucidate a case which turns upon old law. It is, however, for the legal and constitutional historian of the Middle Ages, and not for the practitioner of the present day, that the Register is of paramount importance. For it is the basis of the mediæval common law, a guide to its leading principles, and a commentary upon their application.

So long as the old scheme of actions was a living reality, the Register was of paramount importance to the practitioner—of the same importance as the White Book of the present day. The very first step which a practitioner must take on behalf of his client was to choose a writ; and the choice of a writ meant the choice of a remedy which could only be made

[1] ff. 105b, 108, 109b, 110, 110b.

[2] f. 109b—"De arboribus succidendis et cariandis," and "De cruce lapidea facienda;" cp. H.L.R. iii 224, 225, Coll. Papers, ii 172.

[3] Above 455-456. [4] Vol. iii 26-29. [5] H.E.L. iii 441.

effectual by following rigidly the procedure appropriate to it.[1] "Each writ," said Bereford, C.J., in 1314,[2] "ought to keep its proper place, and be used according to its nature." Thus the writ must be brought in the right court—real actions, for instance, could only be brought in the court of Common Pleas. The process by which the defendant could be made to appear depended upon the writ chosen; likewise the possibility of getting judgment by default. Modes of trial differed—according to the writ chosen there might be trial by battle, by compurgation, by assize, or by jury. Modes of execution also differed—"Can one be put into possession of the thing that has been in dispute? Can one imprison the defendant? Can one have him made an outlaw? Or can he be merely distrained?" The process in some actions was more dilatory than that in others—some actions admitted of many essoins, some of few.[3] When the writ had been chosen, the method of pleading appropriate to it must be employed.[4] "Know, my son," says Littleton,[5] "that it is one of the most honourable, laudable, and profitable things in our law to have the science of well pleading in actions reals and personals; and therefore I counsel thee especially to employ thy courage and care to learn this."

It is not, therefore, surprising to find that some literature grew up around this learning. We have tracts which set out to give instruction as to the nature of writs, and others which set out to give precedents of pleading, or to expound the rules of pleading,

[1] "Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court, and should then state in the words that naturally occur to him the facts on which he relies, and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a writ of right, an assize of Novel Disseisin or of *mort d'ancestor*, a writ of entry *sur disseisin* in the *per* and *cui*, a writ of *besaiel*, or *quare impedit*, an action of covenant, debt, detinue replevin, trespass, assumpsit, ejectment, case. The choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds," Maitland, Forms of Action 296.

[2] Y.B. 8 Ed. II. (S.S.) 151.

[3] Maitland, Forms of Action, 296-298; vol. iii 623-626.

[4] Articuli ad Novas Narrationes (Tottel's ed. 1561) ff. 77b, 78, "Igitur in omni casu primo opus est videre ac intelligere casum. Casuque bene notato et intellecto tunc impetrare breve juxta casum, et deinde super breve bene narrare secundum naturam actionis in forma superius recitata. Quia ubi non habetur bonum et certum breve, quod est omnium actionum fundamentum et originale, impossibile est manutenere bonum placitum, neque facere narrationem congruam, juxta naturam brevis super quo narraturus est;" "it comes to pleading, and here each form of action has some rules of its own. For instance the person attacked wishes to oppose the attacker by a mere general denial . . . what is he to say? In other words, what is the general issue appropriate to the action? In one form it is *Nihil debet*, in another *non assumpsit*, in another 'not guilty,' in others *Nul tort, nul disseisin*," Maitland, Forms of Action 297.

[5] § 534.

or to explain the different jurisdictions of courts. We can conveniently consider these tracts together with the Register, because at this period they were considered to be supplementary to its study.

In the reign of Edward III. a selection of writs was published with a commentary under the title "Natura Brevium." After the publication of Fitzherbert's Natura Brevium it was called the "Old Natura Brevium."[1] Fitzherbert's book was published in 1534, and reprinted in 1537.[2] It is fuller and more readable than the earlier work. A seventh edition, with notes by Sir Mathew Hale, was published in 1730.

Of the tracts which deal with pleading or the jurisdiction of courts the oldest is the *Novæ Narrationes*,[3] i.e. New Declarations, or, to use a more modern term, new statements of claim. The date of the book cannot be precisely determined. It probably comes from the early years of Edward's III.'s reign;[4] but in the form in which it is printed it has received at least two additions.[5] It was first printed by Pynson,[6] and was several times reprinted. It consists of precedents of pleading upon a number of writs, presumably those which were most commonly used. The list of writs upon which the pleadings are given is very similar to the writs annotated in the Old Natura Brevium.[7] For the most part the pleadings are given without comment; but here and there throughout the book there are short notes.[8] In one case a part of a record, in another a report of a case is

[1] Reeves, H.E.L. ii 438; iii 438, 439; the book was printed by Pynson in 1524, and by Tottell in 1584 with some recent cases noted up; for the list of writs contained therein see App. Vg.

[2] Ibid iii 430; Fitzherbert states in his preface that one of his reasons for publishing his work was, "because of late time that book (the Old Natura Brevium) hath been translated into the English tongue, and many things are therein which are not according to the law of the land, and many other things are omitted which are very profitable and necessary for the understanding of the law."

[3] The references are to Tottell's ed. 1561; for the list of writs contained in it see App. Vg.

[4] The evidence for this is as follows: (1) Coke (3 Rep. Pref.) classes it with old books such as Fleta and Hengham, as distinct from newer books like the Old Tenures and the Old Natura Brevium; 10 Rep. Pref. he says that it appeared about the beginning of Edward III.'s reign; Mr. Pike confirms this; he says (Y.B. 12, 13 Ed. III. (R.S.) lxxxii) that the Lincoln's Inn MS. of the work is at least as old as 12, 13 Ed. III. (2) The extract (real or fictitious) from a Y.B. at ff. 72-73b seems to bear this out; the names seem to imply that it was written in Edward III.'s reign. (3) Maitland has shown that certainly as late as Henry IV.'s reign the terms *seisin* and *possession* were used convertibly (L.Q.R. i 324 seqq.; below 581); the book speaks of the seisin of a lessee for years (f. 46) and of a penny (f. 68).

[5] f. 74, a count on the Statute of Labourers of Edward III.'s reign which supposes that Richard II. is king; f. 8, there is a reference to "Richard Norton et ses compaignons justices notre seignour le roy de son comen banke a Westminister;" Richard Norton was made Chief Justice of the Common Bench in 1413, Foss, Judges iv 207, 208.

[6] The date is uncertain; probably about 1515, L.Q.R. i 330.

[7] App. Vg.

[8] ff. 12b, 13b, 14b, 15, 22b, 40, 41b, 67b.

given [1]—both perhaps actual, but more probably fictitious. The book was of considerable authority in Henry VI.'s reign.[2] It is written in French.

Another of these tracts is known as the *Articuli ad Novas Narrationes*. It is probably later in date than the preceding tract. In one of the precedents contained in it the correct distinction is drawn between the "seisin" of the freeholder and the "possession" of the leaseholder, whereas the compiler of the *Novæ Narrationes* did not know of this distinction.[3] The author divides actions into (1) actions relating to land, and (2) actions relating to trespass.[4] This would seem to place the book at a date when the action of trespass and its offshoots were beginning to absorb the old personal actions. On the other hand, no distinction is drawn between trespass and case, nor is there any mention of assumpsit. Moreover, the author does not seem to regard the Chancery as a court of equity.[5] We may therefore, perhaps, conclude that the date of this tract is not much later than the earlier half of the fifteenth century. The name of the book would seem to tell us that it is a supplement to the Novæ Narrationes; but the contents of the book do not quite correspond with the title. It is written in Latin. It deals with much the same actions as those dealt with by the Novæ Narrationes and the Old Natura Brevium—but in an order different from that followed in either of these works. Beginning with a short account of different classes of pleas, it goes on to say a few words about the various courts—royal, communal, and franchise—and their jurisdiction. The main part of the book is taken up by a description of the various forms of action. The plan of the book therefore differs from that of the Novæ Narrationes. There is much less precedent and common form about it, and much more practical information. It was perhaps regarded as a companion book both to the Novæ Narrationes and to the Old Natura Brevium—but more especially, the author seems to tell us,[6] to the latter.

[1] ff. 71-73b. [2] Y.B. 39 Hy. VI. Mich. pl. 43; vol. iii 642.

[3] Above 522 n. 4; f. 93b, "In brevi de ejectione firmæ demonstratio partis, quod cum quidam alius fuit *seisitus* in dominico suo ut de feodo, etc. . . . et terras tali die et anno dimisit querenti ad terminum viginti annorum . . . virtute cujus dimissionis querens fuit *possessionatus* et in *possessione* inde continuavit," etc.; for the list of writs see App. Vc.

[4] f. 75, "In principio omnium sciendum est quod omnia ea placita in curia domini regis placitanda, sunt vel placita terræ vel transgressionis vel utramque tangunt naturam."

[5] f. 76b, "Curia etiam cancellariæ regiæ est curia ordinaria pro brevibus originalibus emanendis et concedendis sed non pro placitatis communibus tenendis."

[6] f. 78, "Quia in libro precedenti brevium natura plane et breviter explimantur nunc valde utile et expediens erit, noscere articulos narrationibus in suis gradibus super brevibus pertinentes."

The last of these tracts, the *Diversité des Courtes*,[1] was not written in this period. It probably comes from Henry VIII.'s reign. It contains a precedent in which his name occurs;[2] and the place assigned by it to the court of Chancery shows that it is considerably later than either of the other tracts.[3] It was considered by the author to be supplementary to them. The learning of writs and pleadings is, he tells us, sufficiently discussed in "le livere de nouvelles tales" and other books. Therefore he will take for his theme the courts.[4] He discusses the Marshalsea, the King's Bench, the Common Bench, the Chancery, the Exchequer, the Cinque Ports, the Court Baron; and goes on to say something of the sheriff and the coroner. The rest of the book is taken up with some notes upon appeals of felony, and other matters relating to the criminal law. At the end there are a few remarks upon various modes of trial of matters of fact, upon the nature of an oath, and upon the definition of perjury.[5]

These four tracts—the Old Natura Brevium, the Novæ Narrationes, the Articuli ad Novas Narrationes, and the Diversité des Courtes—show us very clearly the position which the Register of Writs held in the minds of the lawyers of this period. In their eyes the learning of writs was both the foundation of the law, and the ABC of legal education, because upon it depended a knowledge of the various forms of actions, round which the law was grouped. The preservation of these distinct forms of action was regarded for many centuries as essential to the being of the law. Arguments based on the unreasonableness of, or on the inconveniences caused by, the procedural differences between these forms were brushed aside as founded upon ignorance or presumption by judges so different in date and mental outlook as Fortescue and Lord Mansfield.[6] There is much danger that a body of law, regarded too exclusively from this point of view, will become captious and unreasonable, and that

[1] Tottell's ed. 1561.

[2] f. 116, "Inquisitio intendata capta apud B in comitatu de X xx die mensis Maii anno regni Henrici octavi secundo."

[3] ff. 105-106b.

[4] f. 118b, "Les articles et choses que sont materials, et les briefs apparont deins memes les briefs, et en le livere de nouvelles tales, et en auter liveres, ideo ne besoign ici d'estre reherses, et propter hoc omitto," etc.

[5] ff. 119, 120.

[6] Y.B. 36 Hy. VI. pl. 21 (pp. 25, 26), *Fortescue* said, in answer to an argument that a certain procedural rule would create a meaningless diversity, "La ley est come j'ay dit et ad estre tout dit puis la Ley fuit commence, et nous avoms plusours courses et formes qui sont tenus pour Ley, et ont este tenus et uses per cause de reason, nient obstant que modo le reason ne soit prest en memory;" Lord Mansfield said in the Dean of St. Asaph's Case (1783) 21 S.T. at p. 1039, in answer to Erskine, "Every species of criminal prosecution has something peculiar in the mode of procedure. Therefore general propositions as applied to all tend only to complicate and embarass the question;" for a similar statement by Markham see above 515 n. 4.

principles will be lost sight of amid a maze of procedural details. But this will appear more clearly when I have dealt with procedure as it appears in that most purely professional of all the sources of law—the Year Books.[1]

The Year Books[2]

The Register of Writs is partly the book of the Chancery and partly the book of the legal profession. The Year Books, on the other hand—the Law Reports of the Middle Ages—are the exclusive property of the legal profession. Written by lawyers for lawyers, they are by far the most important source of, and authority for, the mediæval common law.

From the reign of Edward I. to the reign of Richard III. they stretch in a series which is almost continuous. In the reigns of Henry VII. and VIII. they become more and more intermittent; and the last printed Year Book is of the Trinity term 27 Henry VIII. During the terms and years of these centuries they give us an account of the doings of the king's courts which is either compiled by eye-witnesses or from the narratives of eye-witnesses. They are the precursors of those vast libraries of reports which accumulate wherever the common law, or any legal system which has come under its influence, is studied and applied. If we except the plea rolls they are the only first-hand account we possess of the legal doctrines laid down by the judges of the fourteenth and fifteenth centuries, who, building upon the foundations which had been laid by Glanvil and Bracton, constructed the unique fabric of the mediæval common law. Because they are contemporary reports they are of the utmost value, not only to the legal historian, but also to the historian of any and every side of English life. Just as the common law is a peculiarly English possession, so these reports of the doings of the courts which constructed this common law are a peculiarly English source of mediæval history. No other nation has any historical material in any way like them. Yet, until well on into the last century, they existed only in black-letter books, published in the seventeenth century, and printed in contracted law French so carelessly as to be in many instances unintelligible; and the greater part of them are still in this condition. No one had cared to study the manuscripts upon which these printed books were based; and the tale told by tradition as to their origin was accepted without question and without verification. For about the last fifty years their unique historical

[1] Below 552-556; vol. iii chap. vi.

[2] The best introductory account is now Mr. Bolland's Three Lectures on the Year Books, published by the Cambridge Press in 1921.

importance has been gradually arousing some interest in them. The work done upon them by Horwood and Pike for the Rolls Series and by Mr. Bolland for the Selden Society, and, above all, the work done upon them by Maitland has taught us much of their origins, of the language in which they are written, and of their meaning and importance in the history of England and of English law.

I shall consider (1) the manuscripts and printed editions of the Year Books; (2) their origins and development; and (3) their characteristics.

(1) The manuscripts and printed editions of the Year Books.

Until the publication of some of the unpublished Year Books in the Rolls Series practically no attention at all had been paid to the MSS. of the Year Books. The legal profession and even the legal historians never went beyond the printed books, or the Abridgments which had been published in the sixteenth century. No doubt many of these MSS. are lost, superseded by the printed page.[1] Like the works of the lawyers who lived before the age of Justinian, they became useless and disappeared. But when in the last half of last century the work of editing the Year Books began again, it was found that many still survived.

Horwood, describing a large MS. in the Cambridge University library, from which he took the text of the Year Book 20 and 21 Edward I., tells us that, besides the reports of those years, "there is a large body of cases illustrative of pleadings in various writs, and nearly forty consecutive folios (370-409) of cases which, from the names of the judges, must have occurred in or before 18 Edward I. (1290)."[2] Fitzherbert also used for his Abridgment not only Bracton's Note Book, but also reports which came from 12 and 13 Edward I. (1284-1285), as well as a number of undated cases of the time of Edward I.[3] Maitland says that there are numerous cases which come from a period before the dismissal of the judges in 1289; "and," he says, "we may add that one of our manuscripts contains a few cases which, unless we are much mistaken, belong rather to the seventies than to the eighties of the thirteenth century: cases decided by men who were on the bench in Henry III.'s day, and who must have known Bracton."[4] Some of these MSS. give very concise notes of cases. They are rather head notes than reports.[5] Altogether the number of MSS. containing reports of cases of the reign of Edward II. and earlier

[1] See Y.B. 1, 2 Ed. II. (S.S.) xxx, and 3 Ed. II. (S.S.) xvi-xxi for a MS., described by Selden in his Dissertatio ad Fletam, which is now lost; and Y.B. 17, 18 Ed. III. (R.S.) xix for a MS. used by Fitzherbert, which has also disappeared.

[2] Y.B. 20, 21 Ed. I. (R.S.) xv.

[3] Y.B. 2, 3 Ed. II. (S.S.) ix, x.

[4] Ibid x.

[5] Ibid xiv.

which have come before Maitland is thirteen;[1] they all present striking differences from each other.[2] "We are tempted," he says, "to say that whereas an investigator of manuscript literature can generally assume that every codex has only one parent, the ordinary laws of procreation hold good among these legal volumes, and that each of them has had two parents—two if not more. We could not explain this intimacy, were it not that we have before us the work of men who live in close fellowship with each other."[3] Mr. Bolland has consulted sixteen MSS. which contain accounts of the Eyre of Kent of 1313-1314;[4] and for the first six volumes of the Selden Society's Edition of the Year Books of Edward II.'s reign fifteen MSS. have been consulted.[5] The number of MSS. which Mr. Pike has used is smaller; but here again the differences between the MSS. are very considerable, and no one MS. can be considered as pre-eminent.[6] The marginal notes which their owners have fixed to them show that they have been extensively used.[7] On the other hand some of the MSS. of the Eyre of Kent, and of some of the Year Books of Edward II.'s reign show no such signs of use.[8]

Until we get a modern edition of the whole of the Year Books it is impossible to say much of the MSS. of later years. Perhaps these MSS. will tell us something of the mode in which the later reports were made, and the manner in which

[1] Y.B. 2, 3 Ed. II. (S.S.) xiv.

[2] Y.B. 1, 2 Ed. II. (S.S.) xc; 3 Ed. II. (S.S.) xii, xxxii-xli.

[3] Y.B. 3 Ed. II. (S.S.) xli.; Mr. Bolland comes to a somewhat similar conclusion, he says, Eyre of Kent (S.S.) i ci, that no one of the MSS. is "a simple copy from any other, even making an ample allowance for the personal equation of the copyist. One would not care to say so much as to individual cases reported in the different books. Often, indeed, it seems that, if they be not variants one of another, they are variants of the same and not very far removed original;" the same remarks apply to the MSS. of 6 Ed. II., Y.B. 6 Ed. II. (S.S.) xxxviii.

[4] Eyre of Kent (S.S.) i xvi; in addition, two MSS. of the Eyre of Cornwall of 30 Ed. I., some of the cases in which have found their way into the MSS. of the Eyre of Kent below 540; all but three of the MSS. are contemporary, ibid xciii.

[5] Y.B. 4 Ed. II. (S.S.) xl-lx, where a careful history of the ownership and contents of the MSS. are given; and see Y.B. 6 Ed. II. (S.S.) i xii-xix for a further account of MS. Y.

[6] Y.B. 12, 13 Ed. III. xix; cp. 11, 12 Ed. III. x-xviii, 13, 14 Ed. III. xvii-xxi, xxiv, 17 Ed. III. xxx, xxxi.

[7] 20, 21, Ed. I. (R.S.) xviii; 13, 14 Ed. III. (R.S.) xxv; 16 Ed. III. (R.S.) i, xxi, "It is probable that in the multiplication of copies by hand, for the use of the profession, various remarks originally made in the margin became incorporated in the text. . . . It is difficult to account otherwise for the occasional interpolation of a query, with the answer *Credo quod non*, and for various observations, complimentary or otherwise, or statements of law by particular persons."

[8] Eyre of Kent (S.S.) ii xl—"Some of them are clean and unworn, unmarked and unnoted. They bear no sign of use. . . . And may it not well be that we owe our possession of many of them to-day to the fact that they were remainders;" cp. Y.B. 4 Ed. II. (S.S.) xxxvii-viii—"There is scarcely one among them which records the comments or corrections of a critical reader. Such marginalia as we may find are the work of men writing in the fifteenth and sixteenth centuries."

they were circulated among the members of the legal profession—matters about which we are still very ignorant. We shall see that the critical study of the MSS. has already given rise to some conjectures upon this matter.[1] But for the present we have only the old printed editions, in which the whole of the reign of Richard II. and some of the years of Henry V. and VI.'s reigns are omitted;[2] the new printed editions of some of the years of the three Edwards, published in the Rolls Series and by the Selden Society; and one volume of the Year Books of Richard II.'s reign edited for the Ames foundation by George F. Deiser.[3] Of these printed editions, old and new, I must now say something.

It was not till seven or eight years after the introduction of printing into England that the Year Books began to get into print;[4] and it was only gradually and by degrees that some of the many existing MSS. attained to this dignity. From the end of the seventeenth century to the middle of the nineteenth century no new MSS. were printed.

Probably the earliest printer of Year Books was William de Machlinia (1481 or 1482). He is thought to have printed Y.BB. 30-37 Henry VI., and possibly Y.B. 20 Henry VI. Pynson (1493-1528) was their earliest systematic publisher. Fifty editions certainly, and perhaps five more, bear his name. Sixteen others are also attributed to him. His editions published between 1510 and 1520 cover 40-50 Edward III., most of the years of Henry VI. and Edward IV., and the almost contemporary years of 9 and 12 Henry VII. and 14 Henry VIII. Rastell, Redman, Thomas Berthelet, William Myddelton, Henry Smyth, and William Powell were their chief publishers during the first half of the sixteenth century.[5] They published them in separate years separately folioed and dated. At most two were bound together. The booksellers or the lawyers bound these parts together in chronological order.[6]

In 1553 Richard Tottell began his publications of the Year Books. During the thirty-eight years of his activity he succeeded in driving out all his rivals. "There are," says Mr. Soule, "about

[1] Below 539-541.

[2] Hale, Hist. Comm. Law 201, says that he saw the entire years and terms of Richard II.'s reign in MS.; there are a few cases in Fitzherbert, Jenkins, Keilway and Benloe; these have been collected by Bellewe, Reeves, H.E.L. ii 487; Cooper, Public Records ii 392, 393.

[3] Y.B. 12 Rich. II.; unfortunately the editor is able neither to expand his text nor to translate correctly; and he seems to have very little knowledge of mediæval law and practice, see L.Q.R. xxx 274-275 for some illustrations of these defects.

[4] On this subject see Soule, Year-Book Bibliography, H.L.R. xiv 557 seqq.

[5] Ibid 563, 564.

[6] Ibid 561; Mr. Turner, Y.B. 4 Ed. II. (S.S.) lxii thinks that "our Year Books were compiled from small pamphlets or gatherings containing the reports of a few terms only;" for this theory see below 540.

225 known editions of separate years or groups of years which bear his imprint or can be surely attributed to his press." Early in his publishing career Tottell began to publish the separate years in groups. Thus in 1553 he printed the years 1-14 Henry IV. as one book; in 1555 he printed the years 1-21 Henry VII.; in 1556 the years 40-50 Edward III.; in 1562 the years 1-10 Edward III.; and in 1563 the years of Henry V.[1]

From 1587 to 1638 onwards the Year Books were published in parts; and these parts are known as the quarto edition—though really they consisted of small folio volumes. The parts were published as follows: I. 1587. The long report of the fifth year of Edward IV.'s reign known as the "Longo Quinto." This was republished in 1638. II. 1596. Years 1-10 of Edward III.'s reign. III. 1597. The Year Books of 1 Edward V., 1 and 2 Richard III., 1-21 Henry VII., and the years 12, 13, 14, 18, 19, 26, 27 of Henry VIII. IV. 1599. Years 1-22 of Edward IV. V. 1600. Years 40-50 of Edward III., known as "Quadragesms." VI. 1601. Years 21-39 of Henry VI., omitting years 23-26 and 29. VII. 1605. Years 1-14 of Henry IV., and years 1, 2, 5, 7, 8, 9 of Henry V. VIII. 1606. The Liber Assisarum, i.e. a selection of cases taken from all years of Edward III.'s reign, and chronologically arranged. They are reported more concisely than the cases in the other collections, but at greater length than the cases in the Abridgments. IX. 1609. Years 1-20 of Henry VI., omitting years 5, 6, 13, 15, 16, 17. X. 1619. Years 17-39 of Edward III., omitting years 19, 20, 31-37. Thus it is only in the first part of this so-called "Quarto" edition that the original plan of publication in separate years survives.

Between 1638 and 1679 there was a cessation in the publication of the Year Books. They grew so scarce that in 1678 a complete collection was said to have been sold for £40.[2] In 1679 there appeared the standard edition of the Year Books. It consists of eleven parts, the first only of which is new. The first part purports to be the Year Books of Edward I. and II.'s reigns, "selonq les ancient Manuscripts ore remanent en les Maines de Sir Jehan Maynard Chevalier Serjeant de la ley." It consists of Memoranda in Scaccario only of 1-29 Edward I., and Year Books of 1-19 Edward II. The other ten parts are substantially a

[1] Soule 564, 565. At p. 562 Mr. Soule says, "It would seem that while the printers issued separate years and even supplied separate sheets to complete imperfect years, the booksellers and lawyers bound together after 1550, and probably even before that time, these separate pamphlets in chronological order, by reigns, with very much the same arrangement followed in the 1679 edition. But there was no uniformity of editions or imprints—every owner making his own combinations as he happened to get hold of different editions of the several years."

[2] Ibid 565.

reprint of the quarto edition arranged chronologically. The edition is in large folio. Two sides of the leaf of the older edition are contained on one page—a letter B in the margin marking the reverse of the sheet.

This edition, therefore, for the most part simply reprints those of the Year Books which had been already collected by the industry of the law publishers of the end of the sixteenth and the beginning of the seventeenth centuries. Neither the older editions nor the later show any signs of careful editing. In some cases, where two reports of the same case were found in different MSS., "the second report is dissociated from the first, and either made to appear as a report of a different case, or else labelled as a *residuum* or continuation."[1] It is true that Tottell takes credit to himself for having done something in the way of correction ;[2] and there are a few signs that in some cases more than one MS. has been consulted.[3] The edition of 1679 also claims to be corrected and amended ; but in the opinion of those most competent to judge this claim is not justified. Maitland has collected crushing evidence of the carelessness with which it has been printed.[4] He shows that the MS. which Maynard lent, and the table of matters which he furnished, have been so printed that it is almost impossible to make sense of the greater part of the cases. "Of mere, sheer nonsense those old black-letter books are but too full."[5] And at the present day the books which served lawyers "steeped in the old learning of real actions" will not serve us, because "we have not earned the right to guess what a mediæval law report ought to say."[6] Probably Maynard, whose life covered nearly the whole of the seventeenth century,[7] was the last who had thus earned the right to guess what the report ought to have said. The other ten parts of the standard edition are not perhaps so bad as the first part. The printer had a printed text before him and not merely a MS. ; but even so, Mr. Pike says that the earlier editions are preferable to the later editions.

[1] Pike, The Manuscripts of the Year Books, The Green Bag xii 534.

[2] See passages from Tottell's editions of Magna Carta, and the Quadragesms cited by Soule 563, 564, 568.

[3] Ibid 568.

[4] Y.B. 1, 2 Ed. II. (S.S.) xxi-xxviii.

[5] Ibid xxi.

[6] Ibid xxviii ; Pike, The Green Bag xii 535, says, "The imperfections in the manuscripts were probably of less importance than they are now, because the number of copies in existence must have been much greater ; they must have been much more readily accessible to the profession, and the continual use of them must have rendered many obvious corrections in them a matter of comparative ease. The worst of them . . . were not as bad as the printed black-letter editions."

[7] Born 1602, died 1690 ; for an account of him see Bk. iv Pt. I. c. 8. Roger North (Lives of the Norths i 26) tells us that "he had such a relish of the old Year Books that he carried one in his coach to divert him in travel, and said he chose it before any comedy."

The truth is that the same causes which caused the Register of Writs to become an obsolete book [1] caused the Year Books to become obsolete reports. A large, perhaps the largest, part of the cases reported turned upon the management of a system of procedure which had come, with the disuse of many of the older writs, to belong to the past; and the language in which these cases were reported gradually grew more and more unlike that which the lawyers used. What was valuable in the Year Books had passed into the printed Abridgments. For the new law there were modern reports written in modern style.

From 1679 to 1863 nothing was done for the Year Books. The Select Committee on Public Records reported in 1800 that the series of Year Books should be completed by publishing those hitherto unpublished, and by reprinting from more correct copies those which were already in print.[2] This recommendation was not followed till 1863, when the series of the unpublished Year Books of Edward I.'s reign and one year of Edward III.'s reign were edited for the Rolls Series by Horwood between the years 1863 and 1883. In 1885 Pike took up Horwood's work upon the Year Books of Edward III.'s reign. He was the first to begin the practice of collating the Year Books with the plea roll, and he has thereby shown us, "who have not earned the right to guess," the way to verify.[3] "The process," says Pike, "of comparing a report with a record serves a double purpose. On the one hand it gives an authority to the text which would otherwise be wanting, it furnishes a means of deciding between conflicting MSS., and it affords a key to the correct translation of doubtful passages. On the other hand it supplies a ready mode of extracting, from a very valuable but extremely bulky and much neglected class of records, precisely that kind of information which is of the highest value and of the greatest interest. The Year Books are, in fact, to those who know how to use them, the most perfect guides to almost all that is important in the rolls." [4] It has been truly said that this step "will hereafter be regarded as an important advance in the study of English history." [5] Maitland followed Pike's lead in the edition of the Year Books of Edward II.'s reign which the

[1] Above 520.

[2] Cooper, Public Records ii 390, 391.

[3] Pike, H.L.R. vii 266, says: "The report was intended for the use of the legal profession. . . . It was designed to show general principles of law, pleading or practice. . . . The record, on the other hand, was drawn up for the purpose of preserving an exact account of the proceedings in the particular case in *perpetuam rei memoriam*, but only in the form allowed by the court. The report contains not only the reasons eventually accepted, but often the reasons or arguments which preceded each, and the reasons or arguments for which other pleadings were disallowed."

[4] Y.B. 13, 14 Ed. III. (R.S.) xvi, xvii; the idea seems to have been anticipated by Blackstone, see Comm. i 71.

[5] Y.B. 1, 2 Ed. II. (S.S.) xxxi.

Selden Society has published under his editorship. The excellence of the editing, the introductions and the notes go far to justify Maitland's assertion that "our formulary system as it stood and worked in the fourteenth century might be known so thoroughly that a modern lawyer who had studied it might give sound advice, even upon points of practice, to a hypothetical client." [1] But to understand the full force of this saying we must consider the origins and development of the Year Books.

(2) The origins and development of the Year Books.

Till quite recent years it was believed that the Year Books, at all events the Year Books from Edward III.'s reign down to Henry VII.'s reign, were compiled by official reporters paid by the crown. This belief, which was shared by Coke,[2] Bacon,[3] and Blackstone,[4] ultimately rests upon some words used by Plowden in the preface to his reports. "As I have been credibly informed," he says, "there were anciently four reporters of cases in our law who were chosen and appointed for that purpose, and had a yearly stipend from the king for their trouble therein; which persons used to confer together at the making and collecting of a report, and their report being made and settled by so many, and by men of such approved learning, carried great credit with it." It is clear that Plowden's statement rested merely upon report; and the statements of later authorities are merely amplifications of his words.

Sir Frederick Pollock has suggested to me that Plowden's words do not necessarily refer to the Year Books at all. He thinks that they may refer simply to legends of good old days which never had any historical existence. Plowden is not, as Sir Frederick Pollock suggests, writing history: he is simply finding a rhetorical excuse for his shyness in publishing his own reports. If, in fact, any regular system of reporting by official reporters had been in force in the latest period of the Year Books he might well have been acquainted with men who had personal knowledge of it; "and surely both his praise of its merit and his regret for its discontinuance would have been more definite." According to this view, therefore, the tale of the official origin of the Year Books is pure fiction. I think that additional probability is lent to it by the following passage which occurs later in Plowden's

[1] Y.B. 1, 2 Ed. II. (S.S.) xvii. [2] Co. Rep. iii Pref.

[3] Works v 86; in 1617 Bacon persuaded James I. "to revive the ancient custom" by appointing two reporters, "to attende our Courts at Westminster," at a salary of £100 a year, Rymer, Fœdera xvii 27, 28; see Y.B. 4 Ed. II. (S.S.) xi, xix-xxiii for an account of and the documents relating to this episode.

[4] Comm. i 71, 72. Blackstone adds or invents the information that the reports were made by the prothonotaries.

preface: "And (in my humble Apprehension) these Reports [i.e. his own] excell any former Book of Reports in Point of Credit and Authority, for other Reports generally consist of the sudden sayings of the Judges upon Motions of the Serjeants and Counsellors at the Bar, whereas all the Cases here reported are upon Points of Law tried and debated upon Demurrers or special Verdicts, Copies whereof were delivered to the Judge, who studied and considered them, and for the most part argued in them, and after great and mature Deliberation gave Judgment thereupon, so that (in my opinion) these Reports carry with them the greatest Credit and Assurance." The reports to which Plowden considers his own to be superior cannot well be the same as those of the four men; for he evidently considered his own to be inferior to them. On the other hand these reports which he considered to be inferior to his own are very probably the Year Books. They answer to his description of these inferior reports; and they are in fact inferior to his own reports in exactly the points which he notes. If this suggestion be true the whole foundation for the belief in the official origin of the Year Books is destroyed. It seems to me, also, that, if there had been such a system of reporting in the recent past we should expect it to be referred to by the students in their petition to the Council against the encroachments of the Chancery in 1547.[1] If the reports (to which they refer) had been official, it would have strengthened their case; but no such suggestion is made by them.[2]

Naturally there had been some opposition to this complete abandonment of the old tradition. Pike has suggested that a modified form of the old tradition may be true.[3] His theory is based on the conjecture that Plowden's tale of the four men appointed and paid by the king to draw up reports, and Blackstone's tale that these reports were drawn up by the prothonotaries, though incorrect as they stand, are founded upon a combination of two sets of correct facts. He thinks that the four clerks, whom he identifies with the *Custos Brevium* and the three prothonotaries of later days, may have been employed by the king to enter official records in the court of Common Pleas, and that each of these clerks made the separate unofficial reports

[1] Dasent ii 48-50; vol. i 460 n. 9.

[2] They refer to the reports as follows: "By and under which Commen Lawes as well your Lordships as all other the Kinge's subjectes be preserved under the Kinge's Majeste in your lives, honours, goodes, catalles and all other things that yow have and do enjoye therein, by certaine rules and grownde confirmed and approved by reasons and jugementes thereapon, by greate deliberacion gevin, the reportes whereof remaine in writing for every man willing to studie the same ready to be seen."

[3] Y.B. 20 Ed. III. (R.S.) ii lxix-lxxx.

which have come down to us in the Year Books. These two sets of facts, he thinks, were combined by Plowden and Blackstone; and thus there emerged the tale that the Year Books were composed by four official reporters paid by the king. It seems to me that this theory cannot be accepted, firstly because the evidence for it is wholly insufficient, and secondly because it fails to explain the characteristics of the whole series of Year Books.[1] Moreover, it has not commended itself to two of the most recent editors of the Year Books—Mr. Bolland[2] and Mr. Turner.[3]

On the other hand Mr. Turner, like Pike, is reluctant to break wholly with the old tradition.[4] He shows that James I. appointed and paid official reporters, "Whose work has not been preserved either in original or transcript by any officer of the courts;"[5] and from this he infers that the same thing may have happened in the Middle Ages. The old tradition, he thinks, "is not likely to be wholly wrong." "Even if we admit that the earliest Year Books were . . . entirely unofficial in character, we need not assume that an organized system of law reporting never prevailed in the Middle Ages; nor need we deny that there may have been a time when the reporters were paid by the kings of this realm, as Plowden declared and others have believed."[6]

I quite agree that there may have been in the latter part of the mediæval period some organized system for the production and publication of Year Books.[7] But the nature of the occasions in the sixteenth and seventeenth centuries upon which Plowden's tale of the four reporters emerges does not, to my mind, carry conviction that any organization which there may have been, took this form or anything like it. It seems to me that the tale only emerged when it was wanted to point some particular moral. Coke[8] used it to give point to his thesis that better modern reports were needed—these matters, the tale showed, were better looked after in the good old days. Bacon[9] used it to advocate a reform which was not carried into effect till the establishment of the Law Reports. We shall see that the method of producing and publishing law reports in his day and later was most unsatisfactory. He wished to substitute a better system under government patronage; and he used Plowden's tale to prove that this suggestion was neither new nor extravagant.[10] James I. probably used it to justify the establishment of a system of reporting which should enable the government to exercise some sort of censorship

[1] See the question is discussed in detail in L.Q.R. xxvii 279-282.
[2] The Eyre of Kent (S.S.) ii xxxi seqq.
[3] Y.B. 4 Ed. II. (S.S.) xxv-xxviii.
[4] Ibid ix-xxiv.
[5] Ibid xxiii.
[6] Ibid xxiii-xxiv.
[7] Below 540-541.
[8] Above 532 n. 2.
[9] Ibid n. 3.
[10] Bk. iv Pt. I. c. 5.

—to prevent the publication of independent reports which laid down law inconvenient to his views as to the position of the prerogative in the state.[1] Lastly the tale emerged once more in 1666 to prove that the king "hath a particular prerogative over law books," which enabled him to grant by patent the sole right of printing these books.[2] For these reasons it seems to me that Plowden's tale is not likely to shed any light upon any official or semi-official organization which there may have been for the production and publication of Year Books in the Middle Ages.

However this may be, Horwood,[3] Pike,[4] and Maitland,[5] are inclined, for the following reasons, to think that there is very little ground for the traditional belief in its traditional form—that it is certainly not true of the earliest Year Books, and probably not true of any. (1) We do not find any official record of the appointment of such reporters, nor are payments to them anywhere enrolled. (2) If the reports were made by royal officials we should expect to find official copies preserved for the use of the court; but, says Maitland, "so far as we are aware our manuscript Year Books always come to us from private hands."[6] (3) As we have seen, the MSS. are so markedly different from one another that it is difficult to suppose that they spring from one official original.[7] (4) We shall see that the varied and picturesque nature of their contents forcibly suggests that they owe their origin to the enterprise of private members of the legal profession. Even the judges come in for their share of criticism. In one case the reporter hints that the dissent of a judge from his brethren arose from the fact that he had just been

[1] There is no direct evidence in favour of this view; but the following circumstances seem to me to create a presumption of its truth: (1) The date of James I.'s ordinance creating official reporters is 1618; and since 1616 he had been trying to get Coke and the other judges to purge Coke's reports of constitutional heresies, Spedding, Letters and Life of Bacon vi 76-82, 96, 105, 263; (2) it is clear from Bacon's letter to Buckingham (Spedding, op. cit. vi 263) that James I. had made some very material corrections in Bacon's draft of the proclamation establishing official reporters; (3) the reports, according to the proclamation, are not only to be "considered and reviewed" by the judges; they are also "to be presented to our Chancellor or Keeper . . . that we may be acquainted therewith, and such of our Council as we may think convenient"—if I am right as to James I.'s objects, there is little wonder that his scheme fell flat.

[2] The Stationers v. The Patentees about the Printing of Roll's Abridgment (1666) Carter 89; at p. 91 one of the reasons assigned for this prerogative is, "the salaries of the Judges are paid by the King; and reporters in all courts at Westminster were paid by the King formerly;" cp. Millar v. Taylor (1769) 4 Burr. at p. 2327.

[3] Y.B. 30, 31 Ed. I. (R.S.) xxiii, xxiv.

[4] Y.B. 14, 15 Ed. III. (R.S.) xv; 18 Ed. III. lxxx, lxxxi.

[5] Y.B. 1, 2 Ed. II. (S.S.) xi-xiv.

[6] Ibid xii. Pike, The Green Bag xii 535, says, "No Year Books or copies of them have been found among the records of any of the courts. Some of the manuscripts are still in private hands; and those which are in public libraries can usually be traced to a particular donor or vendor."

[7] Above 527.

raised to the Bench, and had argued the case at the bar. That an official reporter should thus have imputed motives is almost inconceivable.[1] In one early MS. there are notes of conversations between the writer and his friends or pupils.[2] We naturally think of those associations of students living together in hostels from which sprang the Inns of Court.[3] (5) Further probability is given to this view by the fact that "we see a most remarkable contempt for the non-scientific detail of litigation: especially for proper names. These very often are so violently perverted that we seem to have before us much rather the work of a man who jotted down mere initials in court, and afterwards tried to expand them, than the work of an official who had the faithful plea rolls under his eye."[4] The divergent versions of the same case which the manuscripts present to us make it probable that their authors were men writing for themselves, who not only simplified facts, but also expanded arguments, and even invented both facts and arguments.[5] It is useful, perhaps, to remember that Plowden—one of the earliest of our modern reporters—called his reports commentaries. (6) At the end of Edward I.'s reign there was no up-to-date text-book extant embodying the results of Edward I.'s legislation. The only way in which the student or the practitioner could learn modern law was by attending court, taking or borrowing notes, and discussion.[6] For these reasons the weight of evidence is all against the old belief in the official origin of the Year Books. The earliest of them, Maitland thinks, were "students' notebooks."[7]

We cannot give the exact date when to some student or practising lawyer "the happy thought"[8] first came of noting down the proceedings of the court. The earliest printed Year Book in the Rolls Series is of the year 1292; but there are, as we have seen, earlier manuscripts.[9] Their writers, Maitland thinks, are persons who are noting down the latest points for the

[1] Y.B. 21 Ed. IV. Mich. pl. 4, "La cause fuit come jeo croy pur ce qu'il fuit de counsel d'autre partie en meme le breve d'error quand il fuit Serjeant."

[2] Y.B. 2, 3 Ed. II. (S.S.) xv, xvi. [3] Above 495-496.

[4] Y.B. 1, 2 Ed. II. (S.S.) xiii; of course it may well be that names were sometimes deliberately changed for the sake of more clearly distinguishing between two parties with the same name, Y.B. 6 Ed. II. (S.S.) xix.

[5] Y.B. 3 Ed. II. (S.S.) lxxii-xciii for specimens of the reporter's work compared with the record. A good instance of divergent reports will be found in Y.B. 3 Ed. II. (S.S.) cases 21 A and B, pp. 186-188. Perhaps a little polish was expected; R. Farewell and J. Dyer tell us, in their dedication of Dyer's reports to the students of the law, that the chief justice "wanted time and leisure to polish and beautifie the said cases with more large arguments which he had a full purpose to have done."

[6] This was partially true also in the seventeenth and eighteenth centuries, see Roger North, Discourse on the Study of the Laws 32.

[7] Y.B. 3 Ed. II. (S.S.) xii.

[8] Y.B. 1, 2 Ed. II. (S.S.) xv, [9] Above 526.

use of themselves or their friends. They give no dates. Often they do not arrange their matter chronologically. Rather, they distribute it under suitable heads, after the manner of the writers of the later printed Abridgments.[1] Thus, "it is only by degrees that the oldest law reports become 'Year Books,' and even when the purely chronological scheme has obtained the mastery we may see that for a while the men who write the manuscripts or have the manuscripts written for them are by no means very careful about assigning the cases to the proper years and terms."[2] In later times the "chronological scheme" does obtain the mastery; and no doubt as the years went on reporting became a more regular pursuit. Still it was an open pursuit.[3] The Books of Assizes, first published by John Rastell in 1516, are reports in a style very different from that of the other Year Books of Edward III.'s reign. They are more concise than the Year Books usually are, giving rather the gist of the argument and the decision than a report of the actual proceedings. They consist "chiefly of reports of assizes of novel disseisin and mort d' ancestor and various pleas of the crown heard before justices of assize in the county." They also contain "a considerable number of cases in trespass and error heard in the King's Bench, and a few cases in Chancery originated by bill." Thus they were supplementary to the ordinary series of Year Books which chiefly contained cases heard in the Common Bench.[4] The Longo Quinto represents a more elaborate effort of reporting than had yet been seen. Often it seems to be more impersonal, and to give the gist of several reports rather than the actual account of the eye-witness. No doubt, too, the reporters became more skilful, more professional, as time went on; they allowed themselves fewer scattered notes, fewer personal details. The report of the case is the main thing, and the report grows fuller.

It was only natural that the system of reporting should gradually develop to meet the obvious needs of a legal profession engaged in administering a system of law, the principles of which depended almost entirely upon the practice of the courts. Just as books of precedents of writs and pleadings were necessary in order that the lawyer might present his case in proper form to the court, so reports of decided cases were necessary if he was to know the principles which the court would apply to decide the case. Indeed, it is probable that it was only gradually that these

[1] The Hale MS. 137 (2) of Y.BB. of Ed. II. contains a Calendarium arranged in a rough alphabetical order.

[2] Y.B. 2, 3 Ed. II. (S.S.) xi; and cp. Y.BB. 30, 31 Ed. I. (R.S.) 1; 4 Ed. II. (S.S.) xxix.

[3] Y.B. 14, 15 Ed. III. (R.S.) xv.

[4] Y.B. 4 Ed. II. (S.S.) xxx.

books of precedents were differentiated from the law report.[1] The book of precedents occasionally borrows from the Year Book;[2] and the Year Book sometimes gives us extracts from the pleadings, and thus serves the purpose of a book of precedents. The two things came, however, to be entirely distinct. Broadly speaking, the book of precedents deals with the formal and the procedural side of legal practice, while the Year Book deals chiefly with the application of the principles which underlie, not only the procedural rules, but also the rules of substantive law. Thus for an intelligent understanding, an intelligent application of the precedents, the reports in the Year Books were essential; and perhaps to many practitioners this consideration was a greater incentive to the study of the Year Books than the fact that it was only through them that a knowledge of the principles of the law could be attained. "The spirit of the earliest Year Books," says Maitland, "will hardly be caught unless we perceive that instruction for pleaders rather than the authoritative fixation of points of substantive law was the primary object of the reporters."[3] But though the needs of the pleader may have been the paramount consideration in the minds of the earliest reporters, though such needs always continued to be an important consideration, it had been clear, since the days of Bracton, that without a knowledge of the doings of the courts there could be no knowledge of English law. His treatise could not have been written if he had not had access to such information through the records which he had retained for a period.[4] But records were valuable things. By a lucky chance perhaps a lawyer might get access to a few of them;[5] but neither the mere apprentice, nor even the serjeant, could be sure of getting the constant access to a series of such documents, which would be necessary if they were to be used for purposes of instruction or as aids to practice. Moreover, much pleading took place, and much argument thereon, which never appeared on

[1] Y.B. 2, 3 Ed. II. (S.S.) xiv; 3 Ed. II. (S.S.) xiv.

[2] Novæ Narrationes ff. 71-73b; and see an extract from the Brevia Placitata cited Y.B. 2, 3 Ed. II. (S.S.) xiv n. 1.

[3] Y.B. 1, 2 Ed. II. (S.S.) xiv.

[4] Above 233.

[5] Maitland (Y.B. 3 Ed. II. (S.S.) xxi) says that one of the MSS. of Edward II.'s Y.BB. contains many records with a precise reference to the roll; and cp. Y.BB. 3, 4 Ed. II. (S.S.) xxxiv; 4 Ed. II. (S.S.) lvi; Pike says that one MS. of the Y.BB. (Add. MS. no. 16560 in the British Museum) for the first 120 folios contains copies of records; the rest of the 323 folios of which the MS. consists is taken up by reports, Y.B. 11, 12 Ed. III. (R.S.) xv; sometimes what look like copies of records appear in the Y.BB., e.g. 11, 12 Ed. III. (R.S.) 210, 13, 14 Ed. III. 306, 17 Ed. III. 324, Longo Quinto pp. 20, 97, 98, 4 Ed. IV. Mich. pl. 25—a precedent of a recognizance; cp. Y.B. 34 Hy. VI. Mich. pl. 42, where the reporter refers at the conclusion of the case to Roll 28 of the Easter Term of 33 Hy. VI.; perhaps there was sometimes an attempt to combine the two sources of information; see Y.B. 6 Ed. II. (S.S.) i xix-xxx for Sir Paul Vinogradoff's conjecture that Redenhale the clerk to the chief justice of the Common Pleas supplied the writer of MS. Y. with a good deal of information,

the roll; and this was often as interesting to lawyers as the matters which appeared there.[1] The legal profession was obliged to supply its own peculiar wants for itself; and thus reports of the doings of the court made by lawyers for lawyers developed.

It is quite clear from the Year Books themselves that the art of law reporting was developing all through the mediæval period. But we have no certain information as to the stages by which it developed; and therefore we do not know anything about the manner in which the Year Books assumed the form in which they exist to-day. It is fairly clear that they originated in notes taken in court; but, as we might perhaps expect, none of these rough notes have come down to us.[2] The problem is to determine how these rough notes, were worked up into the more or less finished product which we have in our MSS.

If we look at the very various ways in which, at a later period in our legal history, notes taken in court got into print, and became our modern reports, we shall be inclined to guess that the ways in which the Year Books assumed their final shape were equally various.[3] These later reports were sometimes compiled, edited and published by the persons who took the notes of the cases in court;[4] and sometimes these persons included in their collections cases reported by others.[5] Very often the persons who took the notes took them with a view to their own instruction only. After their death, or even in their lifetime, they got into the hands of a publisher who printed them; and it may be that the publisher got hold of an incorrect copy, which he proceeded to print with all its imperfections.[6] At a later date we know that reporters were paid by publishers to report the reportable cases in certain courts.[7]

It is not impossible that the evolution of the Year Books was as various as the evolution of the later reports. There seems to be no reason why some of the MSS. of the Year Books may not have been compiled and arranged by the person who took the

[1] Below 555; vol. iii 636-637; cp. Y.B. 3 Ed. II. (S.S.) lxix, lxx.

[2] Mr. Bolland says, Eyre of Kent (S.S.) ii xxxvii, "Mr. Pike has told me that he has never seen an original Year Book, meaning by that term a book that was not almost certainly copied, with more or fewer mistakes, from some earlier book; nor, as far as I know, has anyone else."

[3] For some account of these later reports see Bk. iv Pt. I. cc. 5 and 8.

[4] E.g. Plowden and Coke.

[5] E.g. Dyer.

[6] Bk. iv Pt. I. c. 5; below 540 n. 7.

[7] In 1885 Lord Justice Lindley wrote, "Twenty years ago the state of things was intolerable. The reports of the superior courts of Law and Equity and of the Admiralty and Ecclesiastical Courts and of the House of Lords and Privy Council were all commercial undertakings carried on for profit," L.Q.R. i 137; see Daniel, History and Origin of the Law Reports.

notes of the cases in court.[1] Or the MS. may have been compiled for him, and under his supervision, from scattered notes of cases. In either case such an origin would explain why some of the MSS. show very few signs of contemporary annotation and criticism.[2] Again there seems to be no reason why professional writers of MSS. may not have collected these scattered notes of cases, and had them copied for sale.[3] Mr. Bolland has suggested that this is the explanation why, in the Eyre of Kent of Edward II.'s reign, cases have been inserted from the Eyre of Cornwall of Edward I.'s reign;[4] and why rival reports of the same case sometimes occur in the MSS. and the printed Year Books.[5] If this was the case there is no reason why the resulting MSS. may not have been of all sizes. A man might want the cases of a certain term only, or of a series of terms, just as at the present day a person might wish to purchase either a few volumes of law reports to make up a set, or a whole series. Thus it is quite possible that some of the reports circulated in pamphlet form,[6] while other reports may from the first have been worked up into MSS. of considerable size either by the taker of the notes or by some professional transcriber.

Perhaps it may be allowable to conjecture that, with the growing organization of the legal profession, there grew up in the Middle Ages, as there grew up in later days, some sort of organized system of reporting. With the more frequent citation of cases in court, and the growing authority which was coming to be attached to them, the need for reports grew more pressing. No doubt, as in later times, there was extensive borrowing, and hasty copying of borrowed materials as and when they could be got.[7] It is, however, difficult to suppose that the needs of a

[1] Thus Mr. Turner, Y.B. 4 Ed. II. (S.S.) lvi, says of MS. Y. that many of the reports were "written in the first person singular and reveal to us an author active in the pursuit of legal knowledge. He tells us the opinions of various serjeants, apprentices, and clerks, given on express enquiry, or in the ordinary course of conversation. Notes of this character appear in the later cases only. Apparently he made his own reports for some years and added to them brief notes on legal principles and practice. Then he rearranged his reports and notes according to subject matter and inserted among them as many earlier reports and records as he could find."

[2] The Eyre of Kent (S.S.) ii xl; Y.B. 4 Ed. II. (S.S.) xxxvii, xxxviii; above 527 n. 8.

[3] This is Mr. Bolland's suggestion, Eyre of Kent (S.S.) ii xxxvii-xlii.

[4] The Eyre of Kent (S.S.) i xcviii-c.

[5] Above 530, 536.

[6] For Mr. Turner's pamphlet theory see Y.B. 4 Ed. II. (S.S.) lxii-xcv; I do not think he proves that all the Year Books were compiled from small pamphlets, though probably some, perhaps many, were; the early printed editions were issued in pamphlet form, and separate parts could be purchased, above 529 n. 1; there is no reason why much the same thing may not have happened before the introduction of printing.

[7] Y.B. 20, 21 Ed. I. (R.S.) xviii it is said that the MS. was clearly written from dictation, and that the scribe did not understand what he was writing; see Y.B. 13, 14 Ed. III. (R.S.) xxi for an account of a MS. in which Y.BB. of Ed. II. have

profession so well organized as that of the law did not give rise to some sort of informal organization for the production of reports. It is perhaps more than a coincidence that the serjeant's chief practice was in the Common Bench, and that the greater number of cases reported in the Year Books are common pleas.[1] If there was some sort of organization for the production of reports, and if the legal profession exercised some control over it, we can easily see how the tale of their official origin arose Such a tale would be the more readily believed by an age which had had time to forget the conditions which had prevailed before the introduction of printing. We sometimes speak of "the Law Reports" as official; but the historian of our age will search the national accounts in vain for information as to the sums paid to the reporters.

The development of the art of reporting, by whatever method or methods it was attained, gradually gave rise to our modern theory as to the authority of decided cases. But the process was very gradual. It was only just beginning during this period; and it was not till the rise of the modern reports, and the changes in procedure and pleading which made these reports in their modern form possible, that the authority of decided cases could take its modern shape. During this period we can only trace its remote beginnings.

A reliance on cases was, as we have seen, as old as Bracton; and we can see from the early Year Books that a considered decision was regarded as laying down a general rule for the future. "The judgment to be given by you," said Herle in argument in 1304, "will be hereafter an authority in every *quare non admisit* in England;"[2] and similarly in 1310 Bereford, C.J., said, "By a decision on this avowry we shall make a law throughout all the land."[3] This does not, of course, mean that all the cases to be found in the lawyers' notebooks were regarded as authoritative.[4] In fact, the judges, when pressed by the authority of precedents, were sometimes restive, as the following dialogue shows: "*R.*

got in among Y.BB. of Ed. III.; and cp. Plowden's Rep. Pref. for the manner in which his reports were borrowed, and so incorrectly copied that he resolved to publish them himself.

[1] See Y.B. 3, 4 Ed. II. (S.S.) xxi, xxii. The cases were more interesting, and it was expensive to follow the King's Bench, which in this reign was still to some extent ambulatory. In the seventeenth century, as Roger North tells us, the Common Pleas was, from an educational point of view, more profitable to the student, Lives of the Norths i 28.

[2] Y.B. 32, 33 Ed. I. (R.S.) 32.

[3] Y.B. 3, 4 Ed. II. (S.S.) 161.

[4] Y.B. 3 Ed. II. (S.S.) x, "A little acquaintance with the manuscripts that we have been transcribing would be enough to show that the justices could not have treated them in the way in which a modern judge can treat a modern law report. Those manuscripts differ in every conceivable way. Every citation would begin a new dispute."

Thorpe.—If it so seems to you we are ready to say what is sufficient; and I think you will do as others have done in the same case, or else we do not know what the law is. *Hillary*, J.—It is the will of the justices. *Stonore*, C.J.—No; law is that which is right."[1] Still cases were cited even in the early Year Books,[2] and in Edward III.'s reign there is a more frequent citation of and reliance upon cases. In Henry VI. and Edward IV.'s reigns, if we make allowance for the differences between the manuscripts and the printed book, and the differences between the Year Book and the modern report, cases were cited and distinguished somewhat in the same way as they are cited and distinguished in modern times. This shows that the later Year Books had come to be something very much more than students' notebooks. Just as the voluntary associations of students for the purposes of legal education won their way to the position of the Honourable Societies of the Inns of Court, so these students' notebooks became those Reports which Burke called the sure foundation of English law, and the sure hold of the lives and property of all Englishmen.

The introduction of printing directly affected the accustomed modes of publishing the reports. Men would no longer pay large sums to obtain a MS. or to get the power to copy it when they could buy a printed report, or an abridgment of the reports. A severe shock was therefore given to the production of the Year Books upon the old lines; and the severity of the shock was aggravated by the fact that the same extensive changes in law and practice which were diminishing the importance of the Register of Writs were rendering many of the old cases obsolete. Material changes in the law assisted the mechanical change in the mode of production. The Year Books, as we have seen, ceased to appear in Henry VIII.'s reign. Perhaps some sanguine men considered that there were reports enough.[3] But it soon became apparent that the professors and practitioners of a growing

[1] Y.B. 18, 19 Ed. III. (R.S.) 378; see Y.B. 5 Ed. II. (S.S.) xviii-xxi for the manner in which the judges could ignore even the authority of Bracton.

[2] Y.B. 20, 21 Ed. I. (R.S.) 358 (not followed), 438 (distinguished); 21, 22 Ed. I. (R.S.) 280, 340 (authenticity questioned), 242, 406; 30, 31 Ed. I. (R.S.) 178; 32, 33 Ed. I. (R.S.) 28, 146, 300; 33-35 Ed. I. (R.S.) 24; 3 Ed. II. (S.S.) 34, 60, 199; 3, 4 Ed. II. (S.S.) 109, 138-139, 154, 164; in the Eyre of Kent (S.S.) ii 69, 86-87, 102, 137 cases were cited by the court, and at p. 134 a case was cited and followed; ibid iii 19, 111 cases were cited by the court; Y.B. 4 Ed. II. (S.S.) 45, 59 cases were cited; at p. 168 a case was cited and the record was vouched—to which Stanton, J., replied, "If you find it I will give you my hood;" for other instances see Y.BB. 5 Ed. II. (S.S.) 72-73, 162, 165; 6 Ed. II. (S.S.) 190; 20 Ed. III. (R.S.) ii 48, 82, 214, 250; Y.B. 12 Rich. II. 171. Often the citation of cases by the judges takes the form of reminiscences, see e.g. Y.B. 16 Ed. III. (R.S.) ii 6, "When you and I were apprentices," said *Sharshulle*, "and Sir W. de Herle and Sir J. Stonore were serjeants, you saw Sir J. come to the bar," etc.

[3] Co. Rep. iii Pref.

system of law, developed by the means of decided cases, could not dispense with reports. Dyer [1] and Plowden begin the long list of modern reports.

For many years to come the printed Year Books were absolutely necessary to all students of the law; and the printed abridgments were useful indices to the Year Books themselves, and gradually became the only authorities for the reigns and years which did not otherwise get into print.[2] Just as the Year Books are the best indices to the records,[3] so the abridgments are our only index and guide to the Year Books. Therefore, before going on to speak of the characteristics of the Year Books I shall say something of the abridgments, by means of which the learning of the Year Books was made accessible to future generations of lawyers.

We have seen that one of the early MSS. of the Year Books contains a Calendarium which does not arrange the cases in chronological order.[4] But it is not till the fifteenth century that we get collections of abridged cases arranged under certain headings in alphabetical order.[5] Some of these collections exist in MSS.,[6] and probably many more have disappeared.[7] Four of them have however got into print.

In or about 1490 [8] the earliest of these Abridgments to get into print was published. It is generally assigned to Nicholas Statham, who was Lent reader at Lincoln's Inn in 1471, and died in 1472.[9] But, since it has no title-page, its authorship can only be deduced from the consistent tradition in the profession that Statham was its author. It is generally described as "Epitome Annalium Librorum tempore Henrici Sexti;" but the title is misleading, as "it contains a few notes of cases of the reign of Edward I., and from Edward II. to 38 Henry VI. nearly every reign is represented in the volume." [10] The earlier entries

[1] There are a few cases in Dyer from the 4th, 6th, 19th, and 24th years of Henry VIII. His reports therefore just overlap the latest Year Books. The style of the later Y.BB. is very similar to the style in which these earlier cases in Dyer are reported; for the development of the modern reports see Bk. iv Pt. I. cc. 5 and 8.

[2] Y.B. 13, 14 Ed. III. (R.S.) xlvi, "Many of the cases (not published in the printed Y.BB.) had become thoroughly incorporated into English law through the medium of Fitzherbert."

[3] Above 531. [4] Above 537 n. 1. [5] Y.B. 4 Ed.II. (S.S.) xxix.

[6] See Mr. Turner's account of an Abridgment of the Tudor period in the British Museum, Add. MSS. no. 35936, ibid xxxv-vi.

[7] "They were written at a time when paper, which is much less durable than parchment, had become a popular writing material," ibid xxix.

[8] Thus, if we except some of the Year Books and Littleton's Tenures, it was one of the earliest law books to get into print; there is a copy in the library of the St. John's College, Oxford, and a better one in Lincoln's Inn Library.

[9] Y.B. 4 Ed. II. (S.S.) xxix, xxxi-xxxv; Dugdale, Orig. Jurid. 58, 247, 257; Dict. Nat. Biog.

[10] Y.B. 4 Ed. II. (S.S.) xxxii; "The chief omissions seem to be 2 Edward II., 37 Edward III., 14-19 Richard II., 10 Henry V., and 10, 17, 33, 34, and 37 Henry VI.; though further research may reveal a few cases of some of those years," ibid.

are brief, but the book contains also some long reports not to be found in the printed Year Books.[1] It is remarkable that Statham's will, though it contains a bequest of law books, does not mention his Abridgment;[2] but Mr. Turner thinks that it is possibly referred to in the will of Sir William Callow, one of the judges of the Common Bench of Henry VII.'s reign, under the title of the Abridgment "of Lincolnesin labour;"[3] and infers that it may have been compiled by members of Lincoln's Inn under Statham's direction.[4] Later editions of the book were published in 1585 and 1679. In 1915 a translation, together with notes, was published in America by Margaret Klingel Smith. Unfortunately the translation is very defective; and the notes are not very helpful.[5]

The second of these Abridgments is "The Abridgment of the Book of Assizes" published by Pynson in 1509 or 1510, probably from an ancient MS.[6] It is not connected with Rastell's Books of Assizes which were, as we have seen, first published in 1516.[7] The latter book only contains cases of the reign of Edward III., while this abridgment contains cases of the reigns of Edward III., Richard II. and Henry IV., V., and VI.[8] The book, says Mr. Turner, "was a work of less general utility than Statham's which contains a larger number of headings and treats of many technical matters of law in greater detail."[9] Pynson's edition of this work is now very rare; but the book enjoyed some popularity, as Tottell printed two editions of it in 1555.[10]

The popularity both of this work and of Statham's doubtless suffered from the competition of the third of these abridgments—the very much more complete work of Fitzherbert.[11] His work—Le Graunde Abridgment—was first printed in 1514. It is remarkable not only for its accuracy but also for its research. It contains extracts from many still unprinted Year Books, and also, as we have seen, from Bracton's Note Book.[12] It was a model to future writers of abridgments; and was extensively

[1] Y.B. 4 Ed. II. (S.S.) xxxii. [2] Ibid. xxxiii.

[3] Ibid xxxiv—"ii bookes of Briggementes oon of myne owen labour and thothir of Lincolnesin labour."

[4] Ibid.

[5] Sir F. Pollock in a note to the copy which he has presented to Lincoln's Inn Library, says, "the translation is full of elementary mistakes in French, Latin and law, so much so that in many places it conveys no intelligible sense;" but, he adds, the references to other abridgments and to the Year Books may possibly be of use."

[6] Y.B. 4 Ed. II. (S.S.) xxx, xxxi; but if it is printed from an ancient MS. it can hardly be identified with the abridgment made by Callow, above n. 3, as Mr. Turner suggests, ibid. xxxiv-xxxv.

[7] Above 537. [8] Y.B. 4 Ed. II. (S.S.) xxxi.

[9] Ibid. [10] Ibid.

[11] Dict. Nat. Biog.; Foss, Judges v 167-169.

[12] Above 288.

used by Staunford for his treatise on the Prerogative, and by Bellew for his collection of reports of the years of Richard II.'s reign. Its popularity is attested by the facts that in 1517 John Rastell compiled a table to it,[1] and that it was reprinted in 1516, 1565, 1573, 1577, and 1586.

The last of these abridgments of the Year Books is that of Brooke.[2] Brooke filled the offices of common serjeant and recorder of London. He was Speaker of the House of Commons in 1554, and was made chief justice of the Common Pleas in the same year. He died in 1558, and his work was published posthumously in 1568. It is based on Fitzherbert's abridgment, but it contains much new matter. In particular it abridges fully the Year Books of Henry VII.'s and Henry VIII.'s reigns. "He observes," says Reeves, "one method, which contributes in some degree to draw the cases to a point; he generally begins a title with some modern determination in the reign of Henry VIII., as a kind of rule to guide the reader in his progress through the heap of ancient cases which follow."[3] The book was republished in 1570, 1573, 1576, and 1586.[4]

Brooke's abridgment is the last of the abridgments which deal wholly with the Year Books. Others followed and gradually superseded them, just as the more modern reports gradually superseded the Year Books. The later abridgments deal principally with these modern reports. It is not till much later that we get abridgments which attempt to epitomize under alphabetical headings the principles of the law, and not merely to catalogue the results of the cases.[5]

(3) The characteristics of the Year Books.

There are many mediæval records of various kinds which record contemporary events. There are no other mediæval records except the Year Books which photograph the actual words, and actions, and idiosyncrasies of the actors as they were bringing these events to pass. When we read the official record we think of a machine, which automatically eliminates all the human dramatic element, and describes events and results in one impersonal, accurate, stereotyped form of words. When we read the Year Book we think of a human reporter, mainly interested

[1] See Y.B. 4 Ed. II. (S.S.) xxx.

[2] Dict. Nat. Biog.; Foss, Judges v 359-361.

[3] H.E.L. iii 814—this method had been sometimes also pursued by Fitzherbert.

[4] A selection of the more recent cases contained in Brooke was published in 1578 under the title, "Ascuns novell cases de les Ans et Temps le Roy Henry VIII., Edward VI. et la roygne Mary escrivi en la Graunde Abridgment;" this selection was republished in 1587, 1604, and 1605; it was translated in 1651 by J. March, and the French and English text was republished in 1873.

[5] To some extent Comyn's Digest, and Bacon's Ab.; The Encyclopædia of English Law, and Lord Halsbury's Laws of England.

it is true in law, but, for all that, keenly alive to the exciting incidents of the trial which is proceeding before his eyes—to judicial wit, and criticism, and temper, to the shifts and turns of counsel, to the skilful move or the bungling omission, even to the repartee and the exclamations which the heat of a hardly contested fight evokes. Though therefore the Year Books are valuable because they tell us much of the development of law, they are unique because they picture for us days in court in successive terms and years through these two centuries. Because they do this faithfully, not neglecting that human element which to-day is and to-morrow is not, they supply just that information which is omitted by those who record with mechanical correctness merely the serious business done. We see not only the things done; we see also the men at work doing them, the way these men did them, and how they came to be done in that particular way. It is for this reason that the Year Books are valuable documents not only to the historian of English law, but also to the historian of all parts of English life. They create for us the personal element, the human atmosphere, which make the things recorded in the impersonal record live again before our eyes.

There is a dramatic scene in Parliament in Edward I.'s reign, related by Bereford, C.J., in a style very different from that of any formal record: "In the time of the late King Edward a writ issued from the Chancery to the Sheriff of Northumberland to summon Isabel Countess of Albemarle to be at the next Parliament to answer the King 'touching what should be objected against her.' The lady came to the Parliament, and the King himself took his seat in the Parliament. And then she was arraigned by a Justice of full thirty articles. The lady, by her serjeant, prayed judgment of the writ, since the writ mentioned no certain article, and she was arraigned of diverse articles. And there were two Justices ready to uphold the writ. Then said Sir Ralph Hengham to one of them: 'Would you make such a judgment here as you made at the gaol delivery at C., when a receiver was hanged, and the principal (criminal) was afterwards acquitted before you yourself?' And to the other Justice he said: 'A man outlawed was hanged before you at N., and afterwards the King by his great grace granted that man's heritage to his heir because such judgments were not according to the law of the land.' And then Hengham said: 'The law wills that no one be taken by surprise in the King's Court. But, if you had your way, this lady would answer in court for what she has not been warned to answer by writ. Therefore she shall be warned by writ of the articles of which she is to answer, and this is the law of the land.' Then arose the King, who was very wise, and

said: 'I have nothing to do with your disputations, but God's blood! you shall give me a good writ before you arise hence.'"[1]

The following dialogue between Roubury, J., and the assise illustrates forcibly the relations between judge and jury: "*Roubury.*—How do you say that he was next heir? *The Assise.*—For the reason that he was son and begotten of the same father and mother, and that his father on his deathbed acknowledged him to be his son and heir. *Roubury.*—You shall tell us in another way how he was next heir, or you shall remain shut up without eating or drinking until to-morrow morning. And then the Assise said that he was born before the solemnization of the marriage, but after the betrothal."[2]

The reasonableness of the borough customs was not always apparent to the royal judges. In answer to a plea of Parning, that the usage of Hereford was that a man could sell his land when he could measure an ell and count up to twelve pence, Shardelowe, J., said, "The usage is contrary to law, for one person is twenty years old before he knows how to measure an ell, and another knows how when he is seven years old."[3] We get a glimpse at the actual working of the common field system in the following answer to a plea which set up common as a defence to an action of trespass: "Whereas they have said that this field should lie fallow every third year, and has always done so, Sir, we tell you that that field has always by the custom of the vill, and by the agreement of those therein, been sown in such manner as they chose to agree upon, sometimes for three years, sometimes for one year; and we tell you that it was agreed by all the tenants of the vill who had land in the field whereof we have complained, that the field should be sown."[4]

We see the tax collectors at work setting upon each vill a definite quota of the tax granted by Parliament; "and afterwards each man was apportioned by his neighbours according to the goods and chattels which he had in the same vill."[5] We see an allusion to that uncertainty in the measures of land, and the causes for that uncertainty, which makes so much of our earlier history obscure.[6] We see many allusions to that lawlessness which was prevalent all through this period, and culminated in the Wars of the Roses.[7] The difficulties of travel which made it

[1] Y.B. 3 Ed. II. (S.S.) 196; something of the Countess of Albemarle will be found in Red Book of the Exchequer (R.S.) iii, cccxii-cccxv, 1014-1023.
[2] Y.B. 21, 22 Ed. I. (R.S.) 272.
[3] Y.B. 12, 13 Ed. III. (R.S.) 236. For the name "Parning" see above 514 n. 7.
[4] Y.B. 11, 12 Ed. III. (R.S.) 370; cp. 3 Ed. II. (S.S.) 112, 113.
[5] Y.B. 17, 18 Ed. III. (R.S.) 618.
[6] Y.B. 35 Hy. VI. Mich. pl. 33, p. 29, above 64 n. 6 for the passage.
[7] Above 415-416; see e.g. Y.B. 20 Ed. III. (R.S.) ii, l, li.

necessary for the process of the court to be slow if it was to be fair are forcibly illustrated by many cases.[1] It is clear, too, that the judges of the fifteenth century, like their brethren of the twentieth century, were not anxious to delay the beginning of the vacation by a prolonged discussion of nice points of law. Catesby was arguing for a certain form of plea. Danby told him that he must plead specially, and that he had better plead in this way at once, "because we can't stay to argue matters of law at the very end of the term."[2]

The philological value of the Year Books is unique. "There has probably never been a language," says Pike,[3] "which, after so long a lapse of time, has left such a perfect memorial of itself as the French spoken in English courts of justice, and written in various instruments of the same period. There are other ancient languages which we know as they were written in history, poetry, or philosophy, and which have left such indications of ordinary speech as are to be found in the drama or in artificial displays of oratory. But the colloquial phrases and idioms used by men of cultivation in their ordinary avocations more than five hundred years ago have been handed down in the Year Books, which are, in this respect, absolutely unique." In particular they present the most faithful possible picture of the gradual development and corruption of Law French.

The Year Books are thus valuable in many ways to historians, other than the legal historian, for the glimpses which they give us of many sides of English life. But even from this more general point of view it is to the legal historian that they are chiefly valuable, because they contain a first-hand, and sometimes a critical, account of the doings and sayings of the court as they passed under the reporter's eye. As I have hinted, it is this characteristic of the Year Books which is the strongest evidence against their official origin. I shall here give one or two illustrations of the scenes in court thus described and of the reporter's doubts and criticisms thereon. For convenience I shall group them under the following heads: Manners and Wit of the Bench and Bar; The Relations of Bar and Bench; the Reporter's Notes.

The manners and wit of the Bench and Bar.

Both judges and counsel were fond of swearing, by God, by St. James, or by St. Nicholas. Even in that age, John of Mow-

[1] Y.B. 33-35 Ed. I. (R.S.) 120; 38 Hy. VI. Pasch. pl. 13.

[2] Longo Quinto, p. 54, "Car ne purromus arguer matters en ley per cause del fine del terme;" cp. [1905], 2 Ch. at p. 514, "At this period of the legal year (August 11th) it would not be right to discuss at length the cases which have been commented upon in argument," *per* Cozens-Hardy, L.J.

[3] Y.B. 14 Ed. III. (R.S.) xiv.

bray's direction to the defendant, the Bishop of Chester, to "go to the great devil," is not easily surpassed.[1] The satisfaction of counsel when the judge had given a ruling in their favour sometimes found odd expression. Mutford had recourse to his Vulgate. "Blessed is the womb that bare thee," he said to Metingham, J., when he had given a ruling in his favour.[2] Their dissatisfaction, too, is clearly marked: "*Toudeby.*—Sir, we do not think that this deed ought to bind us, inasmuch as it was executed out of England. *Howard*, J.—Answer to the deed. *Toudeby.*—We are not bound to do so for the reason aforesaid. *Hengham*, C.J.—You must answer to the deed; and if you deny it, then it is for the court to see if it can try, etc. *Toudeby.*—Not so did we learn pleading."[3]

The reporters had a keen eye for the pithy saying, the apposite anecdote, or a wrangle on the bench. "You cannot deny," said Howard, J., "that the tenements as well in one vill as in the other were holden by one and the same service; and you are seised of the tenements in one vill; will you then have the egg and the halfpenny too?"[4] "Once upon a time," said Bereford, C.J.,[5] "a man lay sick abed, and so weak was he that he swooned, and lay in a trance, and it seemed unto him that he came unto a certain place and there saw three pair of gallows, each one higher than the last, and on the shortest hung his grandfather, and on the mean his father; and he asked wherefore this was so; and one answered and said that his grandfather did a disseisin, and for this trespass was hanged, and after him for continuance in the wrong his son was higher hanged, and the third and highest pair of gallows was for his own proper use when he should be dead, because of the yet longer continuance in the wrong. So do not trust too much to what you say about doing no wrong in continuing the estate of your ancestors; for if their estate be wrongful so is your own." In a case of Edward III.'s reign, Willoughby, J., was laying down the law. "That is not law now," said his brother Sharshulle. "One more learned than you are adjudged it," retorted Willoughby.[6] The clergy of the province of Canterbury, argued counsel, do not meddle with the clergy of the province of York, and neither is bound by a grant made by the other—"Because the Jews have no dealings with the Samaritans."[7]

[1] Y.B. 43 Ed. III. Pasch. pl. 43, cited Y.B. 30, 31 Ed. I. (R.S.) xxxi.
[2] Y.B. 20, 21 Ed. I. (R.S.) 436; cp. 11, 12 Ed. III. (R.S.) 312.
[3] Y.B. 32, 33 Ed. I. (R.S.) 72.
[4] Ibid 400.
[5] Y.B. 2, 3 Ed. II. (S.S.) 117; for other apposite tales told by the same judge see Y.B. 5 Ed. II. (S.S.) xxix, xxx; above 546.
[6] Y.B. 14, 15 Ed. III. (R.S.) 114; cp. 11, 12 Ed. III. (R.S.) 442.
[7] Y.B. 21 Ed. IV. Mich. pl. 6 (p. 47).

The relations of Bar and Bench.

The relation between the serjeants and the judges was not quite the same as the relation between the bar and bench in modern times. We have seen that the judges and the serjeants together formed the highest branch of the legal profession—the Order of the Coif—and the Year Books testify to the fact that the serjeants and judges considered themselves to be brothers of one order.[1] The court asks the serjeants for their opinion.[2] Resolutions are come to with their consent.[3] Their dissent or approval is recorded; and, as we have seen, the reporters, at any rate in some of the earlier Year Books, occasionally regard their opinions with more respect than the dicta of the judges. "Judgment is pending," says the reporter, "but all the countors say the writ was invalid."[4] A demandant was non-suited, "because all the serjeants agreed that the writ could not be supported in this case."[5] "And this was the opinion of *Herle* and, for the greater part, of all the serjeants, except *Passeley*, who told *Hedon* boldly to stick to his point. And so [*Hedon*] did."[6] After a dispute on the bench it is noted that the common opinion is against the view of Parning.[7] As we have seen, even a dictum of the apprentices is noted,[8] and sometimes conversations out of court.[9] At the same time the intimacy of the relations between bar and bench did not prevent the judges from speaking their minds very freely to the bar. "We forbid you on pain of suspension to speak further of that averment;" "Leave off your noise and deliver yourself from this account;" "That is a sophistry and this is a place designed for truth"—are remarks attributed to Hengham.[10] "Are not the tallies sealed with your seal? About what would you tender and make law? For shame!" "Get to your business. You plead about one point, they about another, so that neither of you strikes the other;" "These seven years I never was put to study a writ, so much as this; but there is nothing in what you say;" "Do you think, John Hengham, to embarrass the court in this plea as you embarrassed it in the case

[1] Above 492.

[2] Y.B. 2 Hy. VI. Mich. pl. 3—An apprentice had put a case to the court, and then, "Martin l'un des justices mettra le cas a les Serjeants a le barre et demanda que semble a eux seroit fait en ce cas;" see also Y.B. 12 Rich. II. 202.

[3] See e.g. Y.B. 34 Hy. VI. Mich. pl. 13, "Quod fuit concessum per omnes justitiarios et per plusors Sergeants al barre."

[4] 21, 22 Ed. I. (R.S.) 218; cp. the Eyre of Kent (S.S.) iii 11, 36; above 314.

[5] 30, 31 Ed. I. (R.S.) 106; cp. Y.B. 12 Rich. II. 45 for an opinion of the serjeants and the chief clerk.

[6] Y.B. 3 Ed. II. (S.S.) 160.

[7] 14 Ed. III. (R.S.) 214, 216.

[8] Y.B. 21, 22 Ed. I. (R.S.) 446; above 314 n. 3.

[9] Y.B. 2, 3 Ed. II. (S.S.) xv, xvi; 30, 31 Ed. I. (R.S.) 234; 14 Hy. IV. Hil. pl. 37; 33 Hy. VI. Trin. pl. 26.

[10] Y.B. 32, 33 Ed. I. (R.S.) 446; 33-35 Ed. I. (R.S.) 6, 20.

of Christian, the widow of John le Chaluner? By St. James! you will not do so"—are remarks attributed to Bereford.[1] "Shame to him who pleaded this plea," said Malore, J.[2] "I am amazed," said Stonore, C.J., "that *Grene* makes himself out to know everything in the world—and he is only a young man."[3] "This is not the first time we have heard a plea of this kind," sarcastically remarked Sharshulle, J.[4] Pulteney had said, "We do not see what will become of the first plea if this issue be entered." "It will go to the winds, as does the greater part of that which you say," brutally remarked the same judge.[5] A somewhat neater score was made by one of Edward IV.'s chancellors. The plaintiff has no remedy, argued counsel, because he has made no deed; and if a man is so simple that he enfeoffs another on trust without a deed he has no remedy and has only himself to blame. "Not so," said the chancellor, "he will have a remedy here in Chancery, for God protects the simple."[6]

The Reporters' Notes.

The reporters were quick to note a quick retort, a foolish argument, or a bungling plea. "My client is a poor man and knows no law," argued Toudeby. "It is because he knows no law that he has retained you," was Herle's reply.[7] We hear of the laughter in court occasioned by a foolish answer;[8] and we sometimes get criticism of the rulings or manners of the judges. A ruling is noted as "marvellous."[9] "Your answer is double," said Brumpton, J., "and cannot be received;" but, adds the reporter, "he did not assign the reason."[10] Hervey le Stanton gets nick-named Hervey le Hasty.[11] Thirning said to counsel that he had spoken with his fellow justices and that he (counsel) must answer. Upon which Hull (another counsel) remarked aside that he had never before seen that laid down for law, and, sympathetically added the reporter, "I myself have seen the contrary adjudged by the same judges."[12] Mr. Justice Rickel had been a

[1] Y.B. 3 Ed. II. (S.S.) 47, 169, 195; Y.B. 4 Ed. II. (S.S.) 169; cp. Y.B. 3, 4 Ed. II. (S.S.) 134 for an abusive remark addressed to counsel by the same judge.

[2] Y.B. 33-35 Ed. I. (R.S.) 348.

[3] Y.B. 18, 19 Ed. III. (R.S.) 446, 448.

[4] Y.B. 16 Ed. III. (R.S.) ii 446; cp. ibid 480, 482.

[5] Y.B. 17, 18 Ed. III. (R.S.) 350.

[6] Y.B. 8 Ed. IV. Pasch. pl. 11, "Il avera [remedie] et issint poies dire si jeo enfeoffe un home en trust, etc., s'il ne voit faire ma volunte jeo n'avera remedy per vous, car il est ma folie d'enfeoffer tiel person que ne voit faire ma volunte, etc.; mez il avera remedie en cest courte car *Deus est procurator fatuorum;*" for other scenes between judge and counsel cp. Y.BB. 11 Hy. IV. Trin. pl. 49, and 5 Hy. V. Hil. pl. 11.

[7] Y.B. 1, 2 Ed. II. (S.S.) 64.

[8] Y.B. 33-35 Ed. I (R.S.) 326.

[9] Y.B. 16 Ed. III. (R.S.) i 242.

[10] Y.B. 31, 32 Ed. I. (R.S.) 192.

[11] Y.B. 2, 3 Ed. II. (S.S.) 200.

[12] Y.B. 14 Hy. IV. Hil. pl. 37.

plaintiff together with some others in a plea of trespass. The writ was abated, "with the assent of all the justices except the plaintiff," drily observes the reporter.[1] He notes, too, the smile with which Paston, J., pointed what he considered to be a mildly humorous illustration;[2] and the wink by which Stanton, J., conveyed to an attorney the best procedure for him to follow.[3] Similarly we get extraneous facts noted which struck the reporter's fancy. He is reporting a case in the Exchequer Chamber, and notes that it was heard by the new treasurer, about whom he gives us a few details;[4] and he gives us, at the close of the Easter term in the same year, a narrative of the battles of Hedgeley Moor and Hexham, and of the events in the north of England after the battle of Towton, which leads up to an account of the execution of Sir John Grey, "because of his perjury and double-dealing as well to King Henry VI. as to King Edward IV., the present king."[5] He tells us that other arguments were used on another day "when I was not present."[6] Often his notes express his doubts or queries on points of law—and sometimes they are of a lengthy and argumentative kind.[7] Such notes show us the court at work, and something of the minds of the lawyers.

But the Year Books are not primarily collections of pithy sayings and picturesque incidents. Their main object is the teaching of law and the publication of the latest information of the doings of the courts in which this law was being made. Of the light which they shed upon legal development during these centuries we have seen something: we shall see more when we come to deal with the development of the principles of the law during this period. At this point I must say a few words of the outstanding peculiarities of the reports contained in the Year Books, and of the reasons why they differ so widely from the modern reports.

The objection has often been urged, and justly urged, against a system of case law, that the true bearings of the decision cannot

[1] Y.B. 2 Hy. IV. Mich. pl. 48.

[2] Y.B. 19 Hy. VI. Pasch. pl. 5, "Mettons que si un home veut defouler votre femme, vous justifierez de luy battre en defence de votre tres cher compagnon, *et subridebat.*"

[3] Y.B. 4 Ed. II. (S.S.) 132.

[4] Y.B. 4 Ed. IV. Hil. pl. 3, "En l'Exchequer Chambre devant touts les Justices le matiere fuit reherce que fuit perentre le Roy et Sir John Paston, et la fuit le novel Tresorer que fuit fait meme cel terme id est Sir Walter Blount que fuit Tresorer de Calice ii ou iii ans ore passes."

[5] Y.B. 4 Ed. IV. Pasch. pl. 40.

[6] E.g. Y.B. 21 Ed. IV. Mich. pl. 6 (p. 47), "Ad alium diem plusiors des Serjeants argueront mes jeo ne fue a lour arguments."

[7] E.g. Y.BB. 12, 13 Ed. III. (R.S.) 74; 17, 18 Ed. III. (R.S.) 204; 18, 19 Ed. III. (R.S.) 32; 20 Ed. III. (R.S.) ii 52-54; 38 Hy. VI. Pasch. pl. 9; 3, 4 Ed. II. (S.S.) 142, a plaintive note that after diligent enquiry as to the law, he could not find two pleaders of the same opinion.

be understood without some knowledge of the system of procedure and pleading which prevailed when the case was decided. This objection applies with the greater force as we go further back in our legal history; and therefore it applies most forcibly to the reports of our period—the Year Books. It would not perhaps be too much to say that to lawyers who know only our modern reports the Year Books are hardly intelligible. The reports therein contained appear in many cases to be merely reports of desultory conversations between judge and counsel, which often terminate without reaching a distinct issue either of fact or law. Even when a distinct issue of fact or law is reached they often tell us nothing of the final result. Much of their inconclusive character is due, no doubt, to their informal shape. Notes taken by apprentices during the hearing of cases at which they happened to be present will naturally possess such characteristics; and when these notes are copied, and perhaps freely edited, such characteristics will be emphasized. But it is our want of knowledge of the legal environment in which they were produced which is the chief cause of their obscurity. There are vast differences between the mediæval and the modern conception of a trial and all the ideas involved in the notion of a trial. Differences upon matters so fundamental will explain why familiar rules of law appear in the Year Books in unfamiliar guise. They appear there bound up with the intricate manœuvres made possible to a learned profession by an intricate procedure. We who live in a state of society far remote from that of the thirteenth and two following centuries miss much of the reason which such intricacies may have had to the society in which they grew up; and reports intelligible to men living in that society and practising that system are not intelligible to us. The earlier Year Books, too, are, as we have seen, often only the note-books of the apprentice; and, as every student knows, note-books can never be as valuable to others as they are to the maker. At the same time it is only by the help of these notes, which grow fuller as time goes on, that we can accustom ourselves to the atmosphere of the mediæval law court, and to the mind of the mediæval lawyer; and unless we can do this we shall never attain to any real knowledge of the spirit of the mediæval common law.

The mediæval lawyer looked at law from the point of view of the law court.[1] Instruction for practising lawyers was, as we have seen, a primary object of the mediæval law reporter.[2] To understand, therefore, the mode in which the law is stated, applied, and reasoned upon in this period of the Year Books we must keep before us certain differences between the mediæval and the modern

[1] Above 512, 520-521, 524. [2] Above 537-538.

in the rules of process and the rules of pleading. Of these rules I shall speak in the second part of this Book.[1] At this point I shall only attempt to estimate the influence of these rules on the style and contents of the Year Books.

In the first place, the rules of process were extraordinarily elaborate and complex; and throughout the mediæval period they tended to grow more elaborate and more complex. The natural bent of the lawyers, and the unscrupulous litigiousness of the age combined to produce this result.[2] Hence a very large number of cases in the Year Books turn solely or mainly on the intricate manœuvres rendered possible by these rules of procedure. But, in the second place, the most important factor in fixing the style and contents of the Year Books was the evolution of new rules as to the manner in which the parties to an action must state their case to the court—rules in which we can see the beginnings of the purely English system of pleading. The introduction of the system of royal writs, the manner in which the older conception of a trial[3] was being adapted to the jury system, and the admission, under the influence of Roman law, of numerous "exceptiones" or pleas—were all combining to introduce this new system. But as yet it is only in its initial stage; and the form which it took in this initial stage determined the form of the reports in the Year Books—just as the changed form which it took in the modern common law determined the form taken by our modern reports.

We shall see that all through English legal history the object of the pleadings has been to arrive at an issue of fact or law. This is just as true of the mediæval as of the modern common law. But in the mediæval period these pleadings were oral allegations made in court. They were not reduced to writing and finished before the parties came into court. On the contrary, oral pleadings were put forward by the parties in court, and on these suggested pleadings there was a debate as to which of them were best suited to raise the issue upon which the case turned. It was this debate as to the pleadings best suited to raise this issue which interested the reporter, and fixed the character of the report. In the course of this debate many questions of law—material to the issue and immaterial—were mooted and discussed by bench and bar. What view the jury took of the issue of fact so formulated was of comparatively little interest to the legal profession, unless it was made the basis of further proceedings. Decisions upon an issue of law would no doubt have been valuable; but cases which involved such decisions were often adjourned, and the decision

[1] Vol. iii chap. vi. [2] Above 416; below 588.
[3] Vol. i 317; vol. iii 611-613, 628, 633-634.

was, perhaps, never given. The judges, Maitland tells us,[1] were unwilling to decide nice points of law; "too often when an interesting question has been raised and discussed, the record shows us that it is raised and then tells us no more. A day is given to the parties to hear their judgment. A blank space for the judgment is left upon the roll, and blank it remains after the lapse of six centuries." Even if judgment were given, it might well be that the reporter did not happen to be in court on that day.[2] In the meantime the report of the debate which led to the distinct formulation of the issue contained much sound learning and showed where the doubt lay. And so it is these arguments leading to the formulation of the issue which comprise the largest part of the cases reported in the earlier Year Books. Naturally as the argument proceeded new facts were elicited, old facts assumed new aspects, new legal points were suggested, all of which were taken down by the reporter, and edited and annotated for the benefit of himself and his friends. The Year Book, therefore, does not give us a report directed to establish some particular point. Rather, it gives us an account of the discussion which preceded the formulation by the parties and the court of that point; and the matters discussed may bear very little relation to the issue reached.[3] Sometimes no issue was reached.[4] We are reminded of what must have taken place before the Prætor *in iure* when he was engaged, with the help of the parties and their counsel, in settling the formula. If we had some contemporary account of what took place before the Prætor, it would probably resemble the report in the Year Book far more closely than the report in the Year Book resembles the modern report of the arguments and the judgments upon an issue already determined by the pleadings of the parties.[5]

We may note, too, that in a report of this oral debate which preceded the formulation of the issue, the line between argument and decision will tend to become obliterated. Serjeants or apprentices present, but not engaged in the case, will intervene with their advice;[6] and what they say is naturally interesting to the profession. A judge will give information as to the proper course of procedure,[7] or will even condescend to give a little lecture for

[1] Y.B. 3 Ed. II. (S.S.) lxxi and 69.

[2] Above 552; Y.B. 3 Ed. II. (S.S.) 197, information seems to have been supplied to the reporter by the clerk.

[3] Y.B. 3 Ed. II. (S.S.) 31-36, 97, 116-118. [4] Ibid 16.

[5] For some account of this see Greenidge, Legal Procedure in Cicero's Time 179-181.

[6] Y.BB. 21, 22 Ed. I. (R.S.) 148, 242; 33-35 Ed. I. (R.S.) 476.

[7] "*Stanton*, J.—What! Would you have the Little *Cape* when you have put neither your demand nor anything else on the roll, which would be a warrant for the Little *Cape*? *The Attorney*.—Sir, What are we to do? *Stanton*, J.—Go and purchase

the benefit of the student.[1] Naturally reports which record such proceedings will be discursive and conversational. In some of our older reports the reasons given by the judges for their formal decision are styled arguments. The Year Books are really the reports of arguments—arguments used by the bar and the bench. It was the argument rather than the final decision which interested the profession, partly because there was then no such rigid theory as to the binding force of decided cases as that to which we are accustomed, partly because the discussion and the elucidation of legal principles were to be found in the argument rather than in the dry formal decision, and partly because decisions upon points of law were often not given, or, if given, were difficult for the private reporter to collect.

It was not till the rules of process were simplified that the number of cases which turned on the intricacies of mediæval procedure were diminished. It was not till the growth of a law of evidence and the beginnings of the modern system of written pleadings that the style of the law report changes, and the Year Books give place to the modern reports. These changes belong to the legal history of the following period, and I shall deal with them in the succeeding Book of this History. At this point I must leave the Year Books, turn to the lives and works of some of the eminent lawyers of this period, and give some account of their influence on the development of the law.

The Lawyers and the Law

Knowledge of the law was, as I have said, far more widely diffused in the fifteenth century than at the present day;[2] but, with the growing complexity and technicality of legal forms,[3] and with the organization of legal education in the Inns of Court,[4] the practitioners of the law were fast becoming a close profession, the members of which were as distinct from other classes in the community as the merchants or ecclesiastics. Necessarily they lived very similar lives. The man who throve in his profession became a reader in his Inn, took upon himself the state and degree

a new writ, or sue a writ that the tenant be summoned," Y.B. 4 Ed. II. (S.S.) (1310-1311) 132; cp. Y.B. 3, 4 Ed. II. (S.S.) 159, where *Bereford*, C.J., tells a defendant to sue by the process ordained by the Statute, "for to demur at this point would be perilous for you."

[1] Y.B. 36 Hy. VI. pl. 21 p. 26, *Fortescue* sums up the points of the case for the benefit of the apprentices, serjeants, and others of his company; Y.B. 3 Ed. II. (S.S.) 36, *Bereford*, C.J., says to *Westcote*, "Really I am much obliged to you for your challenge, and that for the sake of the young men here, and not for the sake of us who sit upon the bench. All the same you should answer over;" see also the remarks of *Spigurnel*, J., in the Eyre of Kent (S.S.) iii 33.

[2] Above 416.

[3] Below 588-589; vol. iii chap. vi.

[4] Above 493-508.

of serjeant-at-law, became king's serjeant, rode one or other circuit as judge of assize, and in due course ascended one or other of the benches. Very many of the lives of the judges collected by Foss contain these facts and little more. Sometimes, indeed, in the earlier part of this period, we meet with a man among the chief justices, and even among the puisne judges, who was more than a "mere lawyer." In Edward I.'s reign Bereford, who succeeded Hengham as chief justice of the Common Pleas, was employed to treat with the Scotch.[1] In the Year Books of Edward II.'s reign his individuality is strongly marked. He appears there as a quick tempered [2] man of the world, with an anti-ecclesiastical bias,[3] who could illustrate his views by an apposite story well told.[4] He had a sturdy common sense, a desire to do substantial justice,[5] and a reliance on the correctness of his own views which led him to treat records [6] and even statutes [7] with scant respect if they stood in the way of what he conceived to be the law. In Edward II.'s reign Spigurnel, a judge of the King's Bench, twice acted as an ambassador;[8] and Hervey le Stanton acted not only as a judge of the Common Pleas and chief justice of the King's Bench, but also as a baron and chancellor of the Exchequer.[9] In Edward III.'s reign Geoffrey le Scrope was at once a soldier, a judge, and a diplomat.[10] But such versatility as this was becoming more and more rare among the occupants of the bench. Herle, in Edward III.'s reign, had a great name for his legal knowledge, but he only held a judicial office.[11]

In the fourteenth century three common lawyers, Parning,[12] Robert de Thorpe,[13] and Knyvet became chancellors;[14] and as this office was then rather of a political than a judicial character, we

[1] Foss, Judges iii 234-237.

[2] Above 551 n. 1.

[3] See above 305 and nn. 1 and 2.

[4] Above 546-547, 549.

[5] See e.g. Y.B. 6 Ed. II. (S.S.) i 80, 101-102 for two cases where he overruled verbal objections to writs.

[6] "*Bereford*, C.J.—Where is the roll on which aid was granted to you? Then he was shown the roll, and he told *Ridenhale* that he should write upon it Error. And this he did," Y.B. 4 Ed. II. (S.S.) 114.

[7] For his treatment of the statute De Donis—a treatment which helped to create the modern estate tail—see vol. iii 115; for similar dealings with statutes by other judges see above 308 n. 5.

[8] Foss, Judges iii 301-303.

[9] Ibid 303-305; for some further particulars about him see Eyre of Kent (S.S.) i xxiv.

[10] Foss, Judges iii 493-499.

[11] Y.B. 12, 13 Ed. III. (R.S.) cxxvii, Pike says that he "seems to have been regarded by his contemporaries as by far the greatest lawyer of his age;" when, owing to failing health, he ceased to be chief justice of the Common Pleas he still continued to be an honoured member of the council, on account, as the patent says, of his "probata fidelitas, circumspectionis soliditas, et morum gravitas ordinata.'

[12] Foss, Judges iii 476, 477; Y.B. 18 Ed. III. (R.S.) xxxv-lii; for his name see above 514 n. 7.

[13] Foss, Judges iii 526, 527.

[14] Ibid 451-453.

may regard them as exceptions to the ordinary rule. But it may be that their appointment was due to special causes. Parning was clearly one of the first lawyers of his day.[1] As we have seen, he left his mark upon the Register.[2] His capacity for business was so great that the king, in 1340, promoted him from the office of chief justice of the King's Bench to the office of treasurer, and in the following year made him his chancellor—a post which he held till his death, in 1348. There can be little doubt but that Parning's career was due to his exceptional talents. "He was indefatigable in going from court to court," says Pike, "whenever it seemed possible that his knowledge or advice could be of service."[3] He often, as Coke has noted, sat in the court of Common Pleas, and "seems to have been specially interested in difficult cases of *Quare impedit*, or cases in which any question of ecclesiastical history was involved."[4] He was impartial even where the king was concerned. In fact, he was probably the greatest judge of Edward III.'s reign, worthy to be placed beside such predecessors as Bracton and Herle, and such successors as Brian, Fortescue, and Littleton. The other two appointments were probably due rather to political causes than to any exceptional talent in their holders. Robert de Thorpe's appointment, in 1371, as successor to William of Wykeham, was probably connected with the petition of the Commons for the appointment of laymen to the high offices of state.[5] He died in 1372; and, in pursuance of the same policy, John Knyvet, chief justice of the Common Pleas, was appointed to succeed him. He held office till 1377. In that year the king reverted to the usual practice of appointing an ecclesiastic. The chancellorship was a post for statesmen of the learned and literary sort, who had lived in the great world of politics, domestic and foreign; and cosmopolitan ecclesiastics were obviously best fitted to fill it.

In fact, the same causes which had led to the growth of a separate legal profession were rendering the majority of the men who had passed through the legal mill unfit to act in any other capacity than that of judges and counsel. If they acted in any other capacity they undertook duties of a character akin to those of the professional lawyer—advising the council or Parliament upon legal points,[6] or acting as arbitrators, or as receivers and triers of petitions. Fortescue, it is true, at the end of this period

[1] He was acting as attorney in 1315; he was granted an annuity of £1 6s. 8d. and the robe of an esquire in 1325; in the same year he was knight of the shire for Cumberland; in 1333 he was king's serjeant; in 1340 he was a justice of the Common Pleas; in the same year he was made chief justice of the King's Bench.

[2] Above 514.

[3] Y.B. 18 Ed. III. (R.S.) xlviii.

[4] Ibid.

[5] Stubbs, C.H. ii 458.

[6] Nicholas i 81; iii 110; vi 332.

shows by his writings that he was an acute observer and an accurate thinker upon the political phenomena of his day.[1] But, unlike the rest of his brethren, he was a political partisan; and the two works upon which his fame rests—the De Laudibus and the Governance of England—were written, the one in exile, and the other either in exile or shortly after his return. Fortescue's life, as we shall see, was not the life of the ordinary lawyer of the age, so that we may admit that Fortescue is an exception, and assert that he is an exception of the rule proving variety.

That the lawyers and judges thus ceased to be political personages was, I think, a clear gain to the common law. Is not the clause in the Act of Settlement which made the tenure of the judges' offices independent of political considerations regarded as one of its most important provisions? All through this period we see the feeling growing that the law should be supreme above party strife, and that the judges should hold their offices undisturbed by political changes. But they held office during the king's pleasure, and this sometimes left them exposed to the royal caprice. The proceedings of the year 1340 are the best illustration of the inconveniences which might result therefrom. In that year Edward III., irritated by the failure of his supplies, which had caused the abandonment of the seige of Tournay, dismissed not only the chancellor and other officials, but also John de Stonore, the chief justice of the Common Pleas, John de Shardelowe, William de Sharshulle, and Richard de Willoughby, puisne judges.[2] Willoughby was accused of having "perverted and sold the laws as if they had been oxen or cows."[3] He was refused mainprize, and was led about a prisoner from county to county that he might meet the accusations made against him.[4] But it is probable that no very serious accusations were made.[5] The proceedings themselves, as Willoughby pointed out and as the Parliament complained, were very irregular.[6] The contemporary opinion was that the king had been hasty;[7] and in less than two years all four judges were restored.

[1] Below 566-571.

[2] Y.B. 14, 15 Ed. III. (R.S.) xxi-xxx, liii-lvii; Stubbs, C.H. ii 418, 419; Foss, Judges iii 365; Birchington, Angl. Sacra i 20, 21; for the whole list of the accused see Y.B. 14, 15 Ed. III. (R.S.) xxviii.

[3] Y.B. 14, 15 Ed. III. 258.

[4] Ibid 262.

[5] The Y.B. says that "several bills were read which were not affirmed by pledges to which there was no suit;" there was an accusation of bribery on the part of the commonalty of the county of Nottingham, which the accused denied, and another somewhat vague accusation by the county of Lancaster; an accusation of bribery by one Lawrence de Lodelowe was not specifically denied.

[6] The accusations were "per clamour de people;" to this Willoughby said, "La Roi ne voet estre resceu sans estre appris par enditement ou par suyte de partie atache par plegge;" and so also said the Parliament, R.P. 15 Ed. III. no. 9.

[7] Murimuth (R.S.) 117, "Sed quia illud voluntarie et in capite quodam colore iracundiæ factum fuerat, postmodum liberati fuerunt;" cp. Y.B. 14, 15 Ed. III. (R.S.) liii, liv.

In the same way the judges were liable to be entangled when the political questions which divided the state assumed a legal aspect. We have seen that the events of Richard II.'s reign raised a set of constitutional questions similar to those which were raised in the seventeenth century.[1] As in the seventeenth century so in the fourteenth, the judges either chose or were compelled to take the side of the crown—with results disastrous to themselves. The circumstances which led to this unfortunate incursion of the judges into the arena of politics began in 1386 with the impeachment of de la Pole, the chancellor, and the appointment of the commission which took away from the king the government of the state. The king determined to get a judicial opinion that all this was contrary to law. Tresilian, the chief justice of the King's Bench, who was devoted to the royal interests, summoned the judges to Shrewsbury and afterwards to Nottingham, and there presented to them a set of questions and answers to which he desired them to append their seals. All the judges who appeared assented to the propositions, either voluntarily or, as they afterwards alleged, under threats of violence.[2] As soon as Parliament met all these judges were arrested. Tresilian at first escaped, but having imprudently come to Westminster in disguise, he was arrested and executed. The rest were condemned to death; but their lives were spared upon the intercession of the queen and the bishops, and they were sentenced to banishment to various parts of Ireland.[3]

The part which the judges played during the reign of Richard II. is in striking contrast with the part which they played during the Wars of the Roses. They refused to commit themselves to either party; and whether the Lancastrians or the Yorkists were uppermost the same men continued to administer the law. No doubt this is partly due to the fact that no great principle was involved. The dynastic claims of the house of York[4] were but the pretext for the outbreak of a turbulence with which the government had long found it difficult to cope. But it is probably also due to the fact that, as the professors of the law

[1] Above 411, 415, 445 n. 5.

[2] Knighton (R.S.) ii 237 says that Belknappe at first refused, and was compelled to sign by threats of death; but this plea did not avail him on his trial, R.P. iii 229-241.

[3] Foss, Judges iv 2-4; Stubbs, C.H. ii 519-523; Knighton (R.S.) ii 237, 258, 259, 292, 293, 296. The names were Belknappe, C.J., of the Common Pleas, Fulthorpe, Holt, Burgh, J.J., Cary, C.B., and Lokton, king's serjeant; Skipwith was summoned to Nottingham with the rest, but fortunately for himself managed to evade going.

[4] As is pointed out by Figgis, Divine Right of Kings, 82-84, the pretexts put forward both by Edward IV. and Richard III. show that legitimistic views were coming to the front—no doubt they were fostered by the Yorkist claims, and by their temporary success.

withdrew from political life, they had very little interest in dynastic or personal feuds, and were more and more unwilling to intervene in political disputes. The House of Lords tried in vain to extract from the judges a decisive opinion upon the legality of the Duke of York's claim to the throne. They would only say that it was not for them to decide such high matters of policy—it was rather a matter for the lords who were of the king's blood.[1] The king's serjeants and attorney, when applied to, said that if the judges could give no opinion a fortiori they could not do so. Similarly in *Thorpe's Case* they declined to give any decided opinion upon the scope of Parliamentary privilege; and thus the establishment of the rule that Parliament only is the proper judge as to the mode of the user of its privileges may have originated partly in the natural dislike of the judges of this period of civil war and comprehensive acts of attainder to give opinions upon questions of mixed law and politics.[2] At any rate, the breadth of the terms used in laying down the rule in this case has required explanation in more settled times when they were less fearful of dealing with such cases.[3]

But though the judges were averse from interfering with cases of a political kind, they did not shrink from upholding the independence and the majesty of the law. I have already mentioned the tale told by Bereford, C.J., of Hengham's independence;[4] and the same judge related how, in an Eyre in Kent, the judges refused to allow a franchise claimed by the Cinque Ports, "and hanged one of the chiefer barons for a robbery done by him; and, though letters were brought from the king bidding the justices stay their hands, they would not for such reason give way."[5] In 1344 the king attempted to interfere with the hearing of a case of *Quare Impedit* by letters under his privy seal, contrary to the Statute of Northampton.[6] Thereupon counsel pleaded that such interference

[1] R.P. v 376 (39 Hy. VI. no 12), they explained that their proper business was to do justice between party and party, and that this "mater was so high, and touched the king's high estate and regalie, which is above the lawe and passed their lernyng; wherefore they durst not enter into any communication thereof, for it perteyned to the Lordes of the Kyng's blode . . . to meddle in such maters."

[2] R.P. v 339 (32 Hy. VI. no. 26), "The chefe Justicez in the name of all the Justicez after sadde communication and mature deliberation hadde among thaim, aunswered and said, that they ought not to aunswere to that question; for it hath not been used aforetyme, that the Justicez should in eny wyse determine the Privilegge of this high court of Parlement; for it is so high and so mighty in his nature, that it may make lawe, and that that is lawe it may make noo lawe; and the determination and knowlegge of that Privilegge belongeth to the Lordes of the Parlement and not to the Justices;" however, they deprecate undue interference with the law on the ground of privilege, for then "it shulde seeme that this high Court of Parlement that ministreth all justice and equitee shuld lette the process of the commune law."

[3] For the later history of the relation of privilege of Parliament to the law see vol. i 392-394; Bk. iv Pt. I c. 6.

[4] Above 546-547.

[5] Y.B. 5 Ed. II. (S.S.) 17.

[6] 2 Edward III. c. 8.

was wholly illegal; and the pleading was enrolled.[1] We must, it is true, reject the dramatic tale of Gascoigne and Prince Henry, which originated in a book of fiction composed for the amusement of Henry VIII.[2] Possibly, too, the tale that Gascoigne declined to try Thomas Mowbray, the Earl Marshal, because his right was to be tried by his peers, must be similarly rejected.[3] There is no reason, however, for rejecting certain stories to the credit of Markham, C.J. In 1469 he lost his post of chief justice of the King's Bench because he declined to strain the law in order to secure a conviction for treason;[4] and there is an almost contemporary tale that he told Edward IV. that he could not arrest a man for treason or felony, as any of his subjects might, because, if the arrest was wrongful, the subject would be deprived of his remedy.[5] Fortescue, too, it is said, declined to break through the established rules of procedure to please the king.[6] As we have seen, the main theme of Fortescue's De Laudibus is the majesty of a law which even the king ought to obey.[7]

But at the close of this period the relation of the crown to the judges was left very hazy. The king was highly favoured if he was a party to an action, or if his interests were likely to be affected by the decision in a pending action.[8] He was prerogative. He had always had large and indefinite powers of issuing protections to his servants and others, of giving directions

[1] Y.B. 18 Ed. III. (R.S.) 185 n. 2, "Literæ domini regis quas predictus Johannes ostendit Curiæ omnino sunt contra jura, statuta, et consuetudinem regni, ad quas Curia de jure considerationem habere non debet, unde petit judicium et breve episcopo;" cp. Y.B. 20 Ed. III. (R.S.) i 490, 492, and other similar cases cited by Vinogradoff, L.Q.R. xxix 277-278, 282-283.

[2] The tale can be traced to a book called "The Governour," by Sir Th. Elyott, the first edition of which was published in 1532; see on the whole subject an exhaustive article in Royal Hist. Soc. Tr. N.S. iii 47-152; it is pointed out (at p. 150) that in a roll of Mich. 33, 34 Ed. I. m. 6 the Court recited the fact that Edward I. had banished the Prince of Wales from his court for using "verba acerba cuidam ministro suo;" but there is no evidence that Elyott knew of this record, so that we cannot be certain that it is the origin of the story.

[3] Dict. Nat. Biog. *Gascoigne;* one good authority (Capgrave, Chron. (R.S.) 291) expressly says that he was present and took part in the trial.

[4] Foss, Judges iv 443; the reputation of Markham is vouched by Throgmorton when on his trial for treason in 1554, 1 S.T. 894.

[5] Y.B. 1 Hy. VII. Mich. pl. 5, "Hussey, C.J., disoit que Sir John Markham disoit au E. le 4 que il ne poit arrester un homme sur suspicion de Treason ou felon sicome aucuns de ses lieges puissent pour ce que s'il face tort le party ne poit avoir accion."

[6] Fortescue (ed. Clermont) 10—the tale is that one Kerver was imprisoned in Wallingford Gaol; the king pardoned him, and ordered Fortescue to issue a writ for his release; Fortescue said that he had no power to do this, and orders were then sent to the chancellor; this was probably a mere question of procedure; it may be the case referred to in Y.B. 4 Ed. IV. Pasch. pl. 36, below 563 n. 5.

[7] Above 435, 441.

[8] For an account of this branch of the law see Bacon's argument on the writ *De non procedendo rege inconsulto*, Works (ed. Spedding) vii 683-725; cp. Plac. Abbrev. 356, and Ehrlich, Vinogradoff, Oxford Studies vi 145, 152-153, 155-157 for illustrations.

to the judges as to their conduct of a suit, or of stopping the proceedings in such suits. In the Eyre of Kent of 1315-1316 Stanton, J., clearly regarded the royal command as superior in binding force to a statute.[1] In 1340[2] Stonore, C.J., said: "the king has sent to us a certain record which comes from the Treasury and proves that certain fees are holden of him, which they say are the same fees, and also has instructed us by letter that we should seek evidence for him; wherefore we will not hurry the business." The case was consequently adjourned. Doubtless the king derived some revenue from such interferences; and doubtless also the great lords who procured them derived much influence over their dependents.[3] It should, however, be remembered that difficulties in the enforcement of the law often rendered some of these interferences necessary. Fortescue himself strongly advocated the formation of a strong council, and admitted that there were occasions when it was right that it should interfere with the administration of the law in the interests of justice.[4] On the other hand, the gradual growth in the fixity of the law was tending to make such interferences look anomalous unless they could be specially justified.[5] The

[1] *Stonore*, "It is enacted by statute that the Justices in Eyre shall have formal proclamations made that all who desire to purchase writs shall purchase them within a certain limited time, and that all process taken under any writ, not purchased within the time so limited, shall be null and void. Now, sir, we say that this writ was purchased subsequently to the day limited in the proclamation, and we submit that you cannot give any effect to such a writ." *Stanton*, J., "We have received a later authority to do so from the king, and this is equally binding with the statute," Eyre of Kent (S.S.) i 175; for a similar statement see ibid 161; ibid at p. 104 the reporter notes that the judges made a ruling, "rather for the king's profit than to vindicate the law;" cp. ibid Introd. lxxxiii-lxxxiv.

[2] Y.B. 14 Ed. III. (R.S.) 82; cp. Rievaulx Cart. (Surt. Soc.) 403, 404—a mandamus to the JJ. of assize to send the case to the King's Bench, "et interim loquendum cum rege."

[3] Fortescue, Governance of England c. xv, cited vol. i 484.

[4] De Natura Legis Naturæ (ed. Clermont) i c. xxiv, "Iterum Rex qui politice dominaris, etiam, cum casus poposcerit, regaliter rege populum tuum; non enim omnes casus poterunt a statutis et consuetudinibus regni tui amplecti; quo casus residui arbitrio tuo relinquuntur;" for an instance of such interference see a writ of Edward IV. to Nedham and Littleton, JJ. of the county palatine of Lancaster, directing them to show favour to the defendants in an appeal of robbery brought out of malice, Paston Letters iii 428.

[5] De Natura, etc. i cap. xxiv—though the constitutional king has great powers, yet "caveat semper ne ipse leges regni sui justitia gravidas repudians, leges novas, inconsultis regni proceribus, condat, vel inducat peregrinas, quo ipse politice deinceps vivere recusans, jure regali obruat populum suum;" the cases illustrate at once the readiness of the courts to stop proceedings when the king's interests were involved, and the rise of a feeling against undue interference, see 3 Ass. pl. 1—the king allows the case to go "ad finalem discussionem salvo quod non eant ad judicium Rege inconsulto;" 22 Ass. pl. 24; 28 Ass. pl. 39; Y.BB. 20 Ed. III. (R.S.) ii 404; 21 Ed. III. Trin. pl. 19; 28 Hy. VIII. Mich. pl. 15; 22 Ass. pl. 9 Huse argues in vain, "C'est encontre comen Ley, etc., et pur brief de Grand Seal ne Petit Seal nous ne devoms surceaser de faire le Ley;" a similar argument was unsuccessfully urged in Y.B. 18, 19 Ed. III. (R.S.) 216; Y.B. 20 Ed. III. (R.S.) ii 175-176, 342, 372, 390 protections were disallowed; Y.B. 35 Hy. VI. Mich. pl. 2, a protection

statutes and the Parliament Rolls show us that interferences with the due course of law in cases of no political importance, and where no interest of the king was involved, were coming to be regarded as grievances.[1] In fact, this question of the relation of the king to the judges was really a part of the larger question of the relation of the king to the law. Upon the theoretical side of this question much, as we have seen, was written by the political thinkers of the Middle Ages.[2] But the dislike of meddling with politics felt by the majority of lawyers led them to evade test cases; and thus no certain rules were evolved. The old indefinite powers of the crown and parliamentary petitions protesting against their abuse, cases in which the judges had obeyed the orders of the crown, and statutes prohibiting in vague and general terms all such interferences with the course of justice, stood side by side in the books.[3] The timidity of the lawyers of the fifteenth century—a timidity not unreasonable if we consider the character of the times—was one of the reasons why so many fundamental constitutional questions were left for settlement till the seventeenth century. A "constitutional experiment," rendered possible by the weakness of the executive, may have made constitutional history: it is quite certain that the consequent administrative disorder prevented the growth of constitutional law.

The question of the purity of the administration of the law at this period is a question which it is most difficult for an historian to answer. The fury of disappointed litigants will occasionally—even in modern times—lead them to make strange accusations; and in that litigious age, when the passions of the parties were more easily aroused, when all was regarded as

under the Privy Seal was adjudged to be of no use—though it might have been otherwise if it had been under the Great Seal; Y.B. 4 Ed. IV. Pasch. pl. 36—a case of a supersedeas in proceedings to outlaw the defendant—"Un des clerkes del bank le Roy dit que en le temps le Roy Henry 6 quant Fortescue fuit Chief Justice ici . . . il ne voilloit obeyer tel privie seales ore issues;" the judges say that to avoid conflicting decisions they will wait till Markham, C.J., comes; S.C., Y.B. 4 Ed. IV. Trin. pl. 4 the supersedeas was allowed; cp. L.Q.R. xxix 282-284.

[1] Above 448.

[2] Above 252-254, 435, 441.

[3] Many cases illustrate the vagueness of the rules as to the limitations of the powers of the crown, see e.g. Y.B. 21 Ed. IV. Mich. pl. 6 (p. 47); discussing the validity of a dispensation by the crown *Fairfax* says, "Quant a ceo qu'est dit que le Roy ne puit luy excepter, car, s'il purra, par meme le reason il puit excepter touz, le Roy puit excepter en parcel issint ce que per son exception le ley et droiture ne serra distroy. Et est un comen cas que le Roy poit excepter un homme d'estre mis en jure, ou de granter a un ville qu'ils ne serront jures hors de lour ville ou ove foreinz, mes si ne soit assez oustre luy qu'est excepte il n'avera avantage del exception, ou, si le Roy voil excepter touz que sont sufficiants en un comité, c'est void pur touz, car s'il soit bon, justice ne poit estre ministree per entre partie et partie;" for some other cases of royal interference see Y.BB. 12, 13 Ed. III. (R.S.) 186; 13, 14 Ed. III. (R.S.) 332, 334; 16 Ed. III. (R.S.) i 134.

fair in an action at law, we may expect to hear, and do hear very frequently, of the partiality of the officials of the courts and the judges.[1] That some of these accusations, even when detailed and circumstantial, were proved to be untrue, we have direct evidence. In Richard II.'s reign Michael de la Pole, the chancellor, was accused by one John Cavendish, a fishmonger, of conspiring with his clerk, John Clére, to take a bribe. The clerk was guilty, but the chancellor proved that he had no connection with the transaction, and the plaintiff was committed to prison.[2] On the other hand, in 1350 William de Thorpe, chief justice of the King's Bench, was convicted of bribery upon his own confession;[3] and we cannot altogether put on one side the statements made by the chroniclers and in Parliament as to the conduct of the judges and their subordinate officers.[4] We must, of course, make allowance for the manners of the time. Presents to the officers of the courts and even to the judges themselves were not regarded quite in the same light as we should regard them at the present day. No doubt they would not be taken by the best judges—but all officials, and even all the judges, did not attain the same high standard. "The custom of the trade" has always covered many questionable acts; and Bacon's view that he fell a victim, and rightly fell a victim, to a higher standard of judicial morals has in it much historical truth.[5] Fortescue, when he stated that no judge of the king's court had ever been guilty of corruption,[6] was no doubt unduly optimistic—but then he was speaking in praise of the laws of England, and we expect optimism from the writer of a panegyric. Even he does not assert that no official of the courts took bribes. Nevertheless, when all deductions have

[1] We cannot lay much stress on the *ex parte* allegations in the Paston Letters against Paston (i 36) and Prisot (i 211, 213).

[2] R.P. iii 168, 169 (1384).

[3] Foss, Judges iii 527-530; the commissioners appointed to try him sentenced him to imprisonment and forfeiture; afterwards, in consequence of a royal writ, he was sentenced to be hanged, and Parliament confirmed the sentence; the king pardoned the capital sentence, and in the following year part of his lands was restored; in 1352 he was made second baron of the Exchequer.

[4] The Knights Hospitallers' Survey, cited Foss, Judges iii 366, speaks of pensions paid to persons, "tam in curia domini regis, quam justiciariis, clericis officiariis et aliis ministris, in diversis curiis suis, ac etiam aliis familiaribus magnatum, tam pro terris tenementis redditibus et libertatibus Hospitalis, quam Templariorum;" pensions to the amount of £440 are mentioned, of which £60 were paid to judges, clerks, etc.; Sadington, C.B., had 40 marks, and 140 officials of the Exchequer had caps; Knighton (R.S.) ii 266 cites a remonstrance made by Parliament in 1388 which complains that the judges are guilty of extortion, that they wrest the law in compliance with writs under the Privy and Great Seals, and that they favour the great lords in whose retinues they are to be found.

[5] "I was the justest judge that was in England these 50 yeares: but it was the justest censure in Parliament that was these 200 yeares," Works vii 179.

[6] De Laudibus c. 51.

been made, we can see that, with the growth of the legal profession, there is a distinct rise in the standards of professional honour. We find no such wholesale scandals as were rampant in the earlier part of Edward I.'s reign. Judges like Parning and Gascoigne and Markham and Fortescue had at least high ideals as to the sanctity of the law and the responsibilities of the bench. The books and the better class of judges set a high standard of judicial conduct; and even ordinary men cannot pass their lives in learning, and practising, and administering a system which teaches such doctrines without imbibing some of their spirit. We cannot come to any very definite conclusion on this matter. Trustworthy evidence is scanty; our standards are not the same as those of the fourteenth and fifteenth centuries. But we can say that on the whole the organization of the legal profession had, even in an age when public morality was deteriorating, raised the tone of the bench.

During the greater part of this period there are no great legal writers. The activities of the successful lawyers were, as in modern times, taken up by their Inns and by the courts; and their learning is recorded, or perhaps we should say buried, in the Year Books. In fact, as we have seen, this phenomenon had begun to show itself at the latter part of Edward I.'s reign, when the Year Books were beginning and the profession was becoming organized.[1] For the greater part of this period there are merely short and anonymous tracts, such as the Old Natura Brevium,[2] the Novæ Narrationes,[3] the Diversité des Courtes,[4] the old Tenures,[5] and perhaps some others which are now lost to us.[6] But quite at the end of this period we do get two literary lawyers whose works have become legal classics. Fortescue and Littleton were not perhaps better lawyers than many others of their day, but their fame has been perpetuated in books which can be ranked with the legal classics of an earlier age. Fortescue was a jurist. Littleton was a common lawyer. Both in very different ways have helped to make the common law as we see it to-day. I shall therefore say something in detail of these two men.

We know nothing of either the place or the date of Fortescue's birth.[7] He belonged to a Devonshire family, and his father had

[1] Above 322-326. [2] Above 522. [3] Above 522-523.
[4] Above 524. [5] Below 575.
[6] The Old Tenures (ed. in Co. Litt. 12th ed.) at p. 92 refers to a treatise "de Gardes et relief"—though this perhaps refers to the statute 28 Edward I. st. 1, Tomlins, Co. Litt. 692, n.

[7] For Fortescue see Lord Clermont's life in his edition of his works, and Plummer's ed. of the Governance of England; see also Foss, Judges iv 308-315. The only clue we have to the date of his birth is the statement in the De Laudibus c. 50 that a man must study the law for sixteen years before he became a serjeant, and the fact that he became a serjeant in 1429 or 1430; this would put his birth at

been governor of Meaux. He is said to have been a member of Exeter College, Oxford. He was a member of Lincoln's Inn, and a governor of that Society in 1425, 1426, and 1429. In 1429 or 1430 he became a serjeant, and his name begins to appear in the Year Books. It seems that he rode the western circuit. In 1440 and 1441 he was acting as judge of assize in Norfolk; and in the latter year he was made king's serjeant. In 1442 he was made chief justice of the King's Bench, and at some date before May, 1443, he received the honour of knighthood. From that date until the Easter term of 1460 his life is the ordinary life of a judge of that day.[1] He presided in his court; was employed on special commissions to try cases of riot; acted as arbitrator together with the chancellor and the chief justice of the Common Pleas in a dispute between the cathedral and the corporation of Exeter; advised the House of Lords along with the other judges in the case of the impeachment of the Duke of Suffolk, and again in the question of privilege involved in *Thorpe's Case*. It is clear, however, that he had identified himself with the Lancastrian party.[2] It is probable that he was employed at the Lancastrian Parliament held at Coventry in 1459 in drawing the acts of attainder passed against the defeated Yorkists. In 1460 the Yorkists won the battle of Northampton and the Duke of York made his claim to the throne. But later in the same year the queen rallied her forces. The Lancastrians won the battle of Wakefield, marched on London, and again defeated the Yorkists at St. Albans. It was just about this period that Fortescue joined the queen.[3] But the Lancastrian success was short lived. In the following year Edward of York restored the fortunes of the Yorkists by his victory at Towton. Even after this decisive victory the war lingered on for some years in the north of England. It was not until 1464 that Alnwick, Dunstanborough, and Bamburgh finally passed into the hands of the Yorkists. In the year before this Fortescue had accompanied the queen and her son abroad. It was probably in these years

the close of the fourteenth century, Foss, Judges iv 309; Mr. Plummer thinks that this passage in the De Laudibus conflicts with a passage in the De Natura c. xliii which says that a man must have studied the law for twenty years before he attained "ad infimum gradum;" and this grade Mr. Plummer thinks refers to the grade of apprentice; but we have seen that the apprentice was merely a learner (above 508); the serjeant's degree as compared with king's serjeant or judge was "infimum gradum;" and if both passages refer to the serjeant there is not much discrepancy. It is not likely that Fortescue would make a mistake about a matter so much within his own personal experience.

[1] A collection of the cases in which he took part from the Y.BB. with a translation will be found at the end of Clermont's edition of his works.

[2] Paston Letters i 185 (1457), "The Chief Yistice hath waited to ben assaulted all this sevenyght in his hous, but nothing come as yett, the more pitie."

[3] E.H.R. xxvii 321-323.

(1461-1463) that Fortescue was made chancellor. He calls himself chancellor in the De Laudibus, but he was never anything but chancellor *in partibus*. Selden aptly compares his case to that of Clarendon before the Restoration.[1]

The Lancastrian exiles finally retired to St. Mighel in Barrois, which town the queen's father had assigned them as a residence. "Here they live the usual life of exiles, in great poverty, carrying on a feeble agitation at such courts as they had access to, but sometimes in such straits for money that they could hardly pay a messenger to go on their errands."[2] It was not till 1470 that the alliance with Warwick and Clarence secured the expulsion of Edward IV. and the brief restoration of the Lancastrians. Warwick's brother, Archbishop Neville, was made chancellor—Fortescue's claims being disregarded; and the attainders of the Lancastrians were reversed. Fortescue and the queen, however, did not at once come to England. When they landed at Weymouth it was only to learn that Edward had returned, and had defeated and killed Warwick at the Battle of Barnet (1471). Edward prevented their force from marching to the north, where the Lancastrian feeling was strongest; and the Lancastrians were finally destroyed at Tewkesbury. Prince Edward was killed and the queen taken prisoner. Three weeks after, Henry VI. died or was murdered in the Tower.

Fortescue now accepted the position and made his submission to the Yorkists. He was pardoned and made a member of the king's council. But before he could secure the reversal of his attainder and the restoration of his estates he was obliged to write a retractation and a refutation of his arguments which he had urged against the Yorkist title to the throne. This he did to the satisfaction of the king, and his estates were restored in 1475. The last notice which we have of him comes from the year 1476. Whatever view we take as to the date of his birth it is clear that he lived to a good old age.

But for the Wars of the Roses, and but for the fact that Fortescue, unlike his brethren, took a side in those wars, we should probably only know him, as we know most other lawyers of this period, as giving certain decisions and arguing certain cases. His exile made him a diplomat and a statesman. He was at leisure to reflect from the outside both upon the condition of his country, and upon its system of law, in the study and administration of which he had spent the greater part of his life. It is for this reason that his works possess so unique a value. They are the writings not only of a contemporary and a party man, but also of a lawyer who had been at the centre of affairs

[1] Cited by Plummer, op. cit. 57 n.

[2] Plummer, op. cit. 64.

in many various spheres of activity. He shares with Bentham the fame of being at once a lawyer and a practical political philosopher. Both men clearly saw some of the evils from which their own age suffered. Both suggested the remedies which were successfully adopted by the age which followed.

Fortescue's three most important works are the "De Natura Legis Naturæ," the "De Laudibus Legum Angliæ," and the "Monarchia" or the "Governance of England." The first is mainly philosophical and legal; the second is mainly legal; the third is mainly political.

The *De Natura Legis Naturæ*[1] was written in Scotland between April, 1461, and July, 1463. Fortescue wrote it, as he wrote many other shorter tracts,[2] to uphold the Lancastrian claim to the throne. This claim, he says, should be tried by the Law of Nature. The first part consists of a long discussion as to what the law of Nature is.[3] The second part consists of a fictitious action in which Justice is judge, and three claimants, a brother, a daughter, and a daughter's son, assert their claims to the throne of Asia. Judgment is finally given for the brother. Both parts are of enormous length, and, says Mr. Plummer, "considered as a political pamphlet, the work lacks the primary condition of success, namely, readableness."[4] To us the most valuable parts of the work are incidental allusions thrown out by the author which bear upon the law and politics of his time, such as the condition of legal education,[5] the position of the king,[6] the nature of equity.[6] It is because the other works of Fortescue bear more exclusively upon such matters that they are both more valuable and better known.

The *De Laudibus Legum Angliæ*[7] was written at St. Mighel for Prince Edward. It is in the form of a dialogue between Fortescue and the prince. Fortescue's design is to instruct the prince in the leading characteristics of the laws of the country over which he is one day to rule. He explains to the prince the difference between an absolute and a limited monarchy—illustrating his theme by taking France and England as the types of

[1] Plummer, op. cit. 77, 83, 84. The work was printed for the first time in Lord Clermont's edition of Fortescue's works.

[2] For these see Plummer, op. cit. 74, 75.

[3] For the Law of Nature see App. II.; Fortescue seems to have regarded it as an ideal code to which all laws should as far as possible conform—"matrem et dominam omnium legum humanarum," i c. xxix; but it differs from the divine law in that it is wholly of this world—"Circa adeptionem virtutum omnes vires suas consumat hic in terra, dum finis iste non nisi in cœlis poterit reperiri; illic enim non ascendit lex naturæ, quæ ultimos sui termini limites fixit hic in terra . . . sed Lex Divina, cui naturæ legem superius diximus esse subjectam, de cœlo descendit," i c. xliv.

[4] Op. cit. 78. [5] i c. xliii. [6] i c. xxiv.

[7] Plummer, op. cit. 84-86; Clermont 335, 336.

these two forms of rule. He then goes on to compare the English common law with the civil law, greatly to the advantage of the former.[1] Indeed, it is to these characteristic differences that he ascribes all the superiority of Englishmen—a form of political speculation in which he has not wanted for imitators from that day to this. As part of his description of English law he gives us, as we have seen, our earliest account of the Inns of Court, legal education, and the ranks of the legal profession. In his description of the law he purposely abstains from technical details.[2] He explains certain elementary doctrines of the common law, and gives an account of some of its most salient features. It is just because it was written to instruct one who was not a lawyer, and never intended to become a lawyer, that it contains information which, being well known to all contemporary lawyers, we get from no other legal writer. It is probably the first legal book which was avowedly written to instruct a layman in the elements of law. The consequent lucidity of its style, together with the unique character of the information it contains, explain why it has always been among lawyers the most popular of Fortescue's works. It was printed and translated in the sixteenth century. It was annotated by Selden in 1616, and there are many later editions.

The *Monarchia* or *The Governance of England*[3] is one of the latest of Fortescue's works. Its date depends upon the question whether we think that the book was addressed to Henry VI. or Edward IV.[4] If it was addressed to the former it was probably written during the brief period of the Lancastrian restoration in 1470; if it was addressed to the latter it was written after Fortescue had made his peace with the Yorkist government. There is much in common between the *Monarchia* and the *De Laudibus*. Both contain a discussion of the differences between an absolute and a limited monarchy. Both contrast the state of France and England in order to show the goodness of English institutions. But whereas the object of the *De Laudibus* is to instruct in English law, the object of the *Monarchia* is to probe the causes of that want of governance which had led to the Wars of the Roses. As we have seen, Fortescue's analysis of the causes of the weakness of the Lancastrian government is masterly.[5] It

[1] Even the French language, as compared with the law French of the English lawyers, is "by a certaine rudenesse of the common people corrupt!" (c. 48).

[2] c. 8, "It shall not be needful or expedient for you by the travell of your own wit to studie out the hid mysteries of the law. But let that geare be left to your udges and men of law."

[3] Plummer, op. cit. 86-96.

[4] Mr. Plummer inclines to the latter alternative.

[5] Vol. i 484, 491-492.

led to practical suggestions because it was not from books alone that Fortescue derived his inspiration.[1] Without departing in any way from the constitutional position which he had taken up in the *De Laudibus*, he made suggestions which were carried out by the Tudors.

At the end of the fifteenth century it was possible to advocate a strong executive founded upon the prerogative, and yet to believe in parliamentary control. It is for this reason that the practical influence of Fortescue's works has been curiously double. They have enjoyed the rare distinction of having suggested both the measures which led to the establishment of the strongest monarchy which England had had since the time of the Norman and Angevin kings, and the arguments which were frequently and effectively used by the opponents to arbitrary rule.[2]

From his writings, says Mr. Plummer, we may form a very favourable picture of the man.[3] He is very English in his hatred of tyranny and in his denunciations of torture. He is once more the successful lawyer when he is talking of the grandeur of his profession and the merits of the common law. Like many of his profession he knew his Bible well, and was content to adopt the orthodox views upon ecclesiastical questions. He was unlike the other members of his profession in that he sided so earnestly with the Lancastrian cause that he gave up property and place, and followed into exile a fallen cause. His fidelity has had its reward.

We must now turn to one whose fame rests upon very different grounds.

Littleton[4] was born at Frankley—a village six miles south-west of Birmingham. We do not know the exact date of his birth. Both his grandfather and his father had held positions at court. It is said that he himself was at one of the Universities, but there is no proof of this; as we have seen, the Inns of Court were at this period the University of the common lawyers. Littleton was a member of the Inner Temple; and it is between the years 1440 and 1450 that we begin to hear of him as a rising member of his profession. In a petition addressed to the chancellor between the dates 1445 and 1449, the petitioner, who was plaintiff in several actions against the widow of Mr. Justice Paston, complained that he could get no counsel to act for him, and prayed

[1] Plummer, op. cit. 100.

[2] The influence of Fortescue on later political and legal writers has been very clearly worked out by Miss Skeel in her paper on the Influence of the Writings of Sir John Fortescue, R.H.S. Tr. (Third Series) x 77.

[3] Op. cit. 102-104.

[4] For Littleton's life see Co. Litt. Pref.; Wambaugh's ed. of Littleton's Tenures; Foss, Judges iv 436-441.

that certain persons, Littleton among them, should be assigned as counsel to him;[1] and in 1451-1452 Sir William Trussel granted him the manor of Sheriff Hales in Staffordshire for his life, "pro-bono et notabili consilio."[2] During the same years also he was beginning to hold certain offices in his county. In 1444 he was escheator of Worcestershire, and in 1447 he was under-sheriff of the same county. About the same time he was made recorder of Coventry—a post afterwards filled by his great commentator Coke—and as such received the king when he visited the town in 1450. It was probably about this period that he was elected to fill the post of Reader in the Inner Temple. He is the earliest recorded Reader of that Society; and his coat of arms, therefore, is the first in the series emblazoned on the windows of the Hall. The subject of his reading shows that he was already beginning to study the subject which was destined to make his name famous. He read on the chapter of the Statute of Westminster II. *de donis conditionalibus;* and his reading is still extant in manuscript. In September, 1453, he took upon himself the state and degree of serjeant-at-law, and this probably brought with it an increase in practice.[3] In 1455 he was made king's serjeant, and as judge of assize rode the northern circuit. Like many other lawyers of his time, he was unwilling to interfere in politics. He was one of the king's serjeants from whom the House of Lords tried in vain to extract an opinion as to the legal merits of the Duke of York's claim to the throne; and, as was the case with many of his contemporaries who were content to be "mere lawyers," the changes of dynasty which took place during the Wars of the Roses in no way affected his position. Edward IV. reappointed him king's serjeant in 1461, and thus he probably had a hand in drawing the long and complicated statute which determined which of the statutes of the late dynasty were to stand good.[4] He was employed on a commission to arbitrate in a dispute between the Bishop of Winchester and certain of his tenants as to the nature of their services and the quality of their tenure; and he was frequently employed as a judge of assize.[5] In April, 1466, he was made a judge of the court of the Common Pleas, and retained that position till his death. It was the court where real actions were chiefly heard; and it was, no doubt, during his tenure of office as a judge that he used the leisure afforded by that office, and the experience he

[1] Paston Letters i 60 (1444-1449). [2] Wambaugh xxiv n. 2.

[3] There are three references to Littleton as a counsel from the year 1456 in the Paston Letters i 384, 392, 457.

[4] 1 Edward IV. c. 1.

[5] Wambaugh xxxvii; Paston Letters ii 144 (1464).

gained in his court, to write his famous book. The esteem in which he was held is illustrated by the fact that in 1475 he was made a Knight of the Bath at the same time as the two sons of the king. He made his will on August 22nd, 1481,[1] and died on the following day. He was buried in Worcester Cathedral.

Five books stand out pre-eminently in the history of English law—Glanvil, Bracton, Littleton, Coke, and Blackstone, and of these Littleton's book is the first great book upon English law not written in Latin and wholly uninfluenced by Roman law. Coke called it "the ornament of the Common Law, and the most perfect and absolute work that ever was written in any humane science;"[2] and he touched upon the real reason for its author's fame when he said that "his greatest commendation . . . is that by this excellent work which he had studiously learned of others he faithfully taught all the professors of the law in succeeding ages." Written as it was in the professional law French of the day, it summed up the results of the professional development of what was then the most important branch of the common law. It showed that the common law was not merely a collection of rules of pleading and practice which could be compendiously strung together in the short tracts which for the last century and a half had been the only law books which the legal profession had produced. It showed that it possessed principles and doctrines of its own which were scientifically exact and yet eminently practical, because they were founded upon the actual problems of daily life. The book was founded upon the Year Books, but it was no mere summary of decisions. The author tries to get beyond the decisions to the "arguments and reasons of the law," and thus to construct from the already vast number of decisions upon the various parts of his subject a coherent body of legal doctrine by which "a man more sooner shall come to the certainty and knowledge of the law."[3] It is the pioneer of a long series of text-books upon various branches of the common law in its completed form. It has been and it is a model both in its methods and in its style to succeeding writers.

The book was designed to assist the author's son Richard to

[1] For the text of his will see Wambaugh xlvii-lvii. The three portraits of the judge which were once extant have disappeared; the well-known picture in Co. Litt. first appeared in 1629; it is a conventional picture of a judge of the fifteenth century.

[2] Coke's fury was roused by the disparaging remarks of Hotman about Littleton; he had these remarks in his mind when he wrote his preface to his commentary and to Part X. of his Reports, Maitland, English Law and the Renaissance 58, 59.

[3] Epilogue, "Albeit that certain things which are moved and specified . . . are not altogether law, yet such things shall make thee more apt, and able to understand and apprehend the arguments and reasons of the law, etc. For by the arguments and reasons in the law, a man more sooner shall come to the certainty and knowledge of the law. *Lex plus laudatur quando ratione probatur.*"

a knowledge of the law, and it soon obtained and long retained its position as a first book for the student. When it was written is not quite clear—probably towards the close of the author's life. There are two MSS. of it which were almost certainly written while he was alive, but we have not got the autograph. It seems to have been at once accepted as a classic. Mr. Wambaugh tells us that it was printed by Lettou and Machlinia in 1481 or 1482, "being one of the earliest books printed in London, and the earliest treatise on the English law printed anywhere." There was a second edition in 1483, and before 1628 (the year when Coke's edition and commentary was published) it had run to more than seventy editions.[1] Early in the sixteenth century it was translated,[2] and it obtained a commentator before Coke.[3]

These few facts speak more strongly for the intrinsic merits of Littleton's book than pages of elaborate eulogy. Here I would call attention to the characteristic which gives it a unique value from the historical point of view. It describes the land law as it existed at the end of a period of continuous and purely logical development, and just before a period when its doctrines were to be profoundly modified. When Littleton wrote the new doctrines as to Uses were, as we shall see, beginning to modify the strict common law rules;[4] and, whether or not to meet the competition of the new kinds of interests in the land which they rendered possible, the common law was just beginning to think of definitely admitting the validity of the contingent remainder.[5] An effective method had at length been devised of undoing the effect of the statute De Donis.[6] The action of Trespass and its offshoots were soon to encroach upon the sphere of the real actions.[7] Littleton both knew and understood the doctrines of Uses, as his will shows; but the undoubted references to them in his book are of the slightest.[8] He denies the validity of a contingent remainder.[9] There is no hint either that unbarrable entails are things of the past,[10] or that the supremacy of the real actions will shortly be threatened. In fact, the historical interest of Littleton's book is closely parallel to that of Blackstone's Commentaries. It summed up and passed on to future generations the land law as developed by the common lawyers of the Middle Ages, before it was remodelled by the changes inspired by the growth of the new

[1] Wambaugh lix-lxi; see ibid lxvii-lxxxiv for a bibliography of editions. William West in 1581 was the first to divide Littleton's work into the familiar sections.

[2] There is a MS. translation in the Cambridge University Library which Sir K. E. Digby thinks is not later than the year 1500, Encyc. Brit. *Littleton.*

[3] Edited by Cary in 1829. [4] Bk. iv. Pt. I. c. 2.

[5] Vol. iii 135-136. [6] Ibid 118-120. [7] Ibid 27-29.

[8] E.g. §§ 462-464, 499; less distinctly §§ 296 and 352; § 115 is a later interpolation.

[9] § 721. [10] See especially § 364.

equitable principles administered in the Chancery, just as Blackstone's Commentaries summed up and passed on the common law, as developed mainly by the work of the legal profession, before it was remodelled by the direct legislation inspired by the teaching of Bentham.

Before Littleton wrote, the immense importance of the land law had given birth to a small tract, similar in character to the tracts upon writs and procedure noticed above, which is known as the Old Tenures.[1] Probably it was written in Edward III.'s reign;[2] but we cannot be certain as to the date, because the printed copies contain later additions and references which make any conjectures based upon internal evidence very hazardous. It is, as Reeves says,[3] a scanty tract. There are brief descriptions of the various tenures and their incidents, of the various estates which a tenant might hold, of villeinage and villein tenure, of creditors' rights in the land, and of the various kinds of rents. It ends by defining and distinguishing suit real and suit service. Its chief title to fame is that it suggested to Littleton the composition of his treatise. Indeed, it would seem that Littleton, with too great humility, regarded his first two books in the light of an expansion and an explanation of this tract.[4]

The plan and the principle contents of Littleton's book can best be seen from the Table which he inserted at the end. It will be found in the Appendix.[5] To give a full account of the contents of the book it would be necessary to summarize the leading principles of the land law of the fifteenth century. This I shall not here attempt. All I can attempt here is to indicate the nature of the development which had taken place in this branch of the law during this period.

We have seen that the land law had, by Edward I.'s reign, become property law; and that the feudal doctrines retained in it had lost their political importance.[6] This is very clearly brought out by the arrangement of Littleton's book. He puts the learning

[1] It is mentioned by Worrall, Bibliotheca Legum, and by Dibdin, Ames. It was translated by Rastell, who divided it into paragraphs, and appended it to his editions of "Olde Termes de la Ley" published 1571, 1576, and 1579; there were editions of it in the original by Pynson in 1525 who called it "Olde Teners newly corrected," and by Berthelet in 1531. Hawkins printed it with Coke's Tracts in 1764. It is to be found in Co. Litt. 12th edition, and in Tomlins' edition of Co. Litt. My references are to Co. Litt. 12th edition.

[2] At p. 96, "Ut patet Hillar. 16;" at p. 98, "Term Hillar. ann. 46"—the writer thinks it unnecessary to state the name of a reigning king, and so thought Coke, Co. Litt. 394a.

[3] H.E.L. ii 439.

[4] Littleton says at the end of the Table of the second Book, "And these two little books I have made to thee for the better understanding of certain chapters of the Ancient Book of Tenures;" Coke understood this as referring to this tract, Co. Litt. 394a.

[5] App. IV.

[6] Above 347, 349.

of estates—of the quantum of the interest which a man may have in the land—before the learning as to tenures and the incidents of tenure. These two subjects form his first and second books. In the third book he again returns to the subject of estates, and explains various legal doctrines relating thereto. Here I shall say a few words about the law thus described by Littleton under the following heads: (1) Tenures, (2) Estates, (3) Legal doctrines connected therewith.

(1) *Tenures.*

We can see from Littleton's book that the scheme of tenures is definitely fixed. This result was due largely to the operation of the statute Quia Emptores,[1] which not only prevented the creation of new mesne tenures, but also tended to diminish gradually the number of those already existing. Such tenures as Frank-almoin[2] and Homage Ancestral[3] are obviously tending to disappear. The two important free tenures are tenure by knight service and tenure in socage. It is clear that the military service involved in the former is a thing of the past. It is the incidents of the tenure upon which the stress is laid. Even the scutage which represented the military service due was in some measure dependent upon a parliamentary grant.[4] The great features of socage tenure are its certainty, and the fact that its usual feature is the liability of the tenant to pay a money rent.[5] It is the type to which all free tenure of the non-military sort is tending to conform. "All manner of tenures, which are not tenures by knight service, are called tenures in socage."[6] Of the other tenures grand serjeanty is tending to become more like tenure by knight service,[7] while petit serjeanty is, as Littleton says, "but socage in effect."[8] Both of these tenures can only be tenures in chief of the crown.[9] Burgage, again, is a variety of socage tenure to be found in boroughs, dependent therefore upon the borough customs, but subject as to reasonableness to the control of the common law.[10] The true meaning of many of the older forms of land-holding, such as tenure by cornage, has clearly been forgotten.[11] Certain customs, such as the gavelkind custom of Kent, the custom to devise land in a borough, or the custom of borough English are

[1] Above 348.
[2] § 140; vol. iii 34-37.
[3] This is treated by Littleton (Bk. II. chap. vii) as a separate tenure; but it really seems to be a case, not of a separate tenure, but of a tenure of one of the recognized kinds which has existed from before the time of legal memory, see § 152, "A man may hold his land by homage ancestral and by escuage, or by other knight's service, as well as he may hold his land by homage ancestral in socage."
[4] §§ 97, 98; vol. iii 44.
[5] § 117.
[6] § 119.
[7] § 158.
[8] § 160.
[9] § 161.
[10] §§ 162, 170.
[11] § 156; E.H.R. v 626 seqq.; above 168.

well known and recognized;[1] but we can see that the effect of the centralized administration of the common law has been to eliminate, in the case of land held by a free tenure, most exceptional customs, except those few which have obtained a definite and recognized position in the law.[2] Similarly the law as to the various incidents of free tenure is presented in its final form. The ceremony of homage, the oath of fealty, wardship and marriage, relief, escheat and forfeiture, are described much as a modern book on the law of real property would describe them. The space which Littleton gives to rents of various kinds—rent service, rent charge, and rent sec—shows us that the relationship between landlord and tenant is fast becoming a cash nexus.[3]

When dealing with tenure in villeinage Littleton regards the case of the unfree person holding by an unfree tenure as the normal case.[4] But he clearly states that free men may hold villein land; and "no land holden in villeinage, or villein land, nor any custom arising out of the land, shall ever make a free man villein"[5]—though he admits that it is foolish of a freeman to take land to be holden of services, such as merchet, which are peculiarly the mark of villein status.[6] Littleton describes generally the modes in which villeinage may be proved, the modes in which it may come to an end, the relation of a villein to his lord, and his relation to third parties. We can see that the status of the villein is servile only in relation to his lord,[7] that he has certain rights even as against his lord, and that the modes in which he may become free are numerous. The leaning of the law is in favour of liberty;[8] but still there is a class of persons who are unfree and under disabilities which can be compared to the disabilities of the outlaw, the alien, the man condemned upon a writ of præmunire, the man professed in religion, and the excommunicate.[9]

It is remarkable that Littleton makes no special mention of tenure in Ancient Demesne. He probably regarded it as being substantially similar to the tenure of the copyholder, or tenant by

[1] Vol. iii 259-263, 271.

[2] § 170, speaking of tenure in burgage, Littleton says, "Note that no custom is to be allowed, but such custom as hath been used by title of prescription, that is to say from time out of mind;" and prescription, "if it be against reason ought not, nor will not be allowed before judges," § 212.

[3] §§ 213-240.

[4] § 172, "Tenure in villeinage is most properly when a villein holdeth of his lord to whom he is a villein."

[5] § 172.

[6] § 174; merchet is the fine paid for the marriage of a son or daughter, vol. iii 31, 200.

[7] See especially § 189, "Also every villein is able and free to sue all manner of actions against every person, except against his lord, to whom he is villein. And yet in certain cases he may have against his lord an action."

[8] §§ 175, 188.

[9] §§ 196-201; see vol. iii 491-510 for villein status.

the verge; and this may perhaps be accounted for by the changed position of such tenants. The distinguishing characteristic of tenure in Ancient Demesne was the fact that such a tenant had in the little writ of Right and the writ of Monstraverunt remedies by means of which he could get protection in the royal courts, whereas the ordinary copyholder was not protected at all by these courts.[1] As we shall see, the copyholder's interest gained protection from the royal courts, by a different remedy, it is true, but still it gained protection, at the end of this period;[2] and this probably tended in some measure to destroy the importance of the distinction between these different kinds of tenure.[3] However that may be, Littleton's omission to deal precisely with this class of tenants left their exact position unsettled until the eighteenth century.[4]

(2) *Estates.*

As with tenure so with estates—their nature and incidents are settled in practically their modern form. The immense power which a man had in the time of Bracton of setting what conditions he pleased when he made a grant has been much curtailed.[5] The conditions with which Littleton deals are chiefly conditions for the payment of rent, for re-entry in case of non-payment of rent, or for the payment of money lent on the security of land; and, as we shall see, Littleton seems inclined to think that conditions may be made to do some of the work which was being done by the Use.[6] The law has now some definite views as to the validity of conditions. Thus the general principle is stated that conditions restraining alienation are void;[7] but some modifications of this principle are admitted in the case of the estate tail.[8] In fact, the definite closing of the list of possible estates, and the definite ascertainment of their incidents, has considerably restricted the number and the kind of the conditions which a donor may impose at his will. There may, as we shall see, be some question about the legality of a determinable fee;[9] but Littleton can state perfectly generally that "every man that hath an estate of freehold in any lands or tenements, either he hath an estate in fee, or in fee tail, or for term of his own life, or for term of another's life."[10] Similarly we have clearly stated and defined the various forms of holding in common—parcenary,

[1] Above 378; vol. iii 265-266.
[2] Ibid 208-209.
[3] Vinogradoff, Villeinage 115, 116. The Old Tenures seems almost to class it with the free tenures, Tottell's ed. 121b.
[4] Blackstone, Law Tracts i 103-160; vol. iii 267-269.
[5] Above 262; vol. iii 103-104.
[6] Below 594 n. 5.
[7] § 360.
[8] §§ 361-364.
[9] Vol. iii 105.
[10] § 381.

joint tenancy, and tenancy in common—with their several characteristic features.[1] The only estate known to modern law which does not appear in his book, because it is of later origin, is the estate of the tenant from year to year.

We can see from Littleton's book that old rules relating to estates have had the longest life when they touch closely upon family relations. In the case of Dower he gives us some learning about varied forms of dower which were becoming obsolete when he wrote;[2] for, as he says, the usual rule was that "the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals."[3] In connection with the law as to the estate of coparceners he has much to say upon gifts in frank-marriage, and upon the liability of a daughter, who has received an advancement by such a gift, to put the land so received into hotchpot if she wishes to share with a sister.[4] The common law had already limited these rules as to hotchpot and advancement to gifts in frank-marriage.[5] The equitable principles involved therein were destined in the future to receive not only a great extension at the hands of the chancellor, but also recognition and enforcement by an enactment of the legislature.[6]

The position of the mortgagee at common law has become definitely fixed. "If a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, etc., £40 of money, that then the feoffor may re-enter, etc., in this case the feoffee is called tenant in mortgage . . . and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead . . . as to the tenant."[7] The common law has definitely declined to admit any other right of redemption than that actually stipulated for.[8] If the mortgagor die before the legal time for redemption has expired, the duty to pay the debt may be discharged by the executors; and if the mortgagee die the money should be paid to his executors.[9] Till the time fixed for redemption has expired the mortgagee's estate is regarded as simply a security for money lent, which money can be paid to and should be received by the executors and not by the heir.[10] This idea will bear much fruit when, after the legal time for redemption has expired, the court of Chancery recognizes an equity of redemption.

[1] §§ 241-324; vol. iii 126-128.
[2] §§ 38-51; vol. iii 189-191.
[3] § 37.
[4] §§ 267, 273, 275.
[5] § 275.
[6] The Statute of Distribution, 22, 23 Charles II. c. 10 § 5; vol. iii 562.
[7] § 332; vol. iii 130.
[8] Above 336.
[9] §§ 337, 339.
[10] § 339, "The money at the beginning trenched to the feoffee in manner as a duty, and it shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and therefore the payment shall not be made to the heir."

Littleton says comparatively little about incorporeal things. He mentions such rights as a common or an advowson which can be held in gross;[1] and we can see that there is another class of rights—the easements of our modern law—which can only be appendant or appurtenant to land.[2] The rule that such rights lie in grant is clearly stated;[3] and the further rule also that, as it is only a feoffment with livery of seisin which can have a tortious operation, such rights can only be created by a person who has a legal right to create them.[4] This distinction between things that lie in grant and things that lie in livery will tend to strengthen the distinction between corporeal and incorporeal things. It will be further strengthened by the fact that such modes of acquisition as custom and prescription, whether by a man and his ancestors or in a que estate, are applied only to certain classes of these incorporeal things.[5] We have seen that such interests in land as advowsons, rents, the services due from tenants, remainders and reversions, seem to partake of the nature of incorporeal things, inasmuch as they give no present right to possession of the land; but that they have been treated as corporeal things or as actual estates in the land.[6] Their double nature is clearly brought out in Littleton's book. They lie in grant. But the grant is of little effect unless the tenant attorns (i.e. agrees to accept the grantee as his lord) or the right is exercised.[7] The attornment or the exercise of the right in the case of grants of such things answers to the livery of seisin in the case of grants of estates in land vested in possession; and it is equally necessary. At the same time the idea, which is present in Bracton's treatise, that the relationship between lord and tenant can be translated into the terms of contractual obligation has not been wholly lost sight of; "the most common attornment," says Littleton, "is to say, Sir, I attorn to you by force of the said grant, or I become your tenant, etc., or to deliver to the grantee a penny, or a halfpenny, or a farthing, by way of attornment."[8] This may be done "in the name of seisin"—at any rate where the service consists in the payment of a rent;[9] but there may also be some trace of the idea that such payment binds the bargain between the tenant and the new lord. We have seen that such giving of earnest is a common and an ancient form of making a contract.[10] The lines of difference between *res corporales* and *incorporales*, between the grant of a right, the grant of a thing, and the making of a contract are as yet by no means clearly drawn. On the other hand,

[1] § 617.
[2] § 183.
[3] § 183 and cp. § 618; vol. iii 98.
[4] § 618; Y.B. 3 Ed. II. (S.S.) 6, 7.
[5] §§ 170, 183; vol. iii 166-171.
[6] Above 355-356.
[7] §§ 552, 555; vol. iii 100-101.
[8] § 551.
[9] § 235.
[10] Above 85, 87.

the forms which Littleton gives of deeds of grant—indentures and deeds poll—are substantially the same as in modern law.[1]

The two most important developments made in this branch of the land law during this period are (i) the adequate protection at length given to the lessee for years, and (ii) the recognition by the common law of the interest of the copyholder.

(i) The tenant for term of years cannot, indeed, bring the real actions; and, seeing that just about the time when Littleton's book was written, the term "seisin" was coming to be applied exclusively to the possession of a freehold interest in land protected by a real action, the lessee for years is not seised.[2] But he is very far from being entitled merely to the benefit of a covenant with his landlord as under the earlier law. He has much more than a personal right of action against his landlord on the covenant, and much more than the limited remedy given by the writ of *quare ejecit infra terminum* against the feoffee of his landlord.[3] He is protected in his possession as against all the world by the action of *ejectio firmæ*—one of the offshoots of the action of trespass; and in that action it was clear, probably by Edward IV.'s reign, and certainly by Henry VII.'s reign, that he could recover not merely damages but the land itself.[4] He has possession of a chattel only it is true, but that chattel is a chattel real; for it possesses affinities with freehold interests in land in that it can be the subject of tenure, and in that fealty is due from lessee to lessor.[5] But, because it is a chattel, it can be left by will, and it passes on death to the executor or the administrator. When the real actions fell into desuetude and when land was made devisable, it was the latter characteristic which for many centuries to come differentiated the chattel real from the freehold interest.

(ii) The interest of the tenant who holds by an unfree tenure became about this time a definite interest, protected and recognized, not merely by the custom of the manor, but by the common law. "Tenant by the custom is as well inheritor to have his land according to the custom as he which hath a freehold at the

[1] §§ 371, 372.

[2] L.Q.R. i 324 seqq.; and add to Maitland's list of examples of the use of the term "seisin" applied to chattels Y.B. 17, 18 Ed. III. (R.S.) 514; Litt. § 324 laid down the law for the future as to the proper use of the terms "seisin" and "possession;" that this was new law we can see from the fact that Littleton himself uses the term "seisin" of the termor (§ 567) and of the owner of chattels (§ 177), and the term "possession" of the freeholder (§ 576); Maitland concludes (L.Q.R. i 333) "that it did not become definitely wrong to speak of the termor as seised until after the end of the fourteenth century;" and that (ibid 339) "the necessity of distinguishing the title to bring *ejectione firmæ* from the title to bring an assize forced upon the courts the verbal distinction between possession and seisin."

[3] Above 262.

[4] Vol. iii 216.

[5] §§ 58-132.

common law."[1] He, again, is not protected by the real actions, but by another offshoot of the action of trespass. His interest differs from that of the freeholder in that its shape is moulded, not solely by the common law, but chiefly by the custom of the manor. It is more difficult in the case of the copyholder than in the case of the freeholder to lay down any general rules as to the incidents of his tenure. But Littleton's book shows that the customs of manors have already been so moulded and controlled by the common law that some general statements can be made;[2] and it is clear that the general similarity between the incidents of the tenure of copyholders on different manors will tend to grow with the increased control over questions relating to the tenure assumed by the common law courts.

Thus we may say that by the end of this period all interests in land had been brought under the jurisdiction of the common law courts, and were adequately protected by them. The differences between the interests of the freeholder, the lessee for years, and the copyholder preserved the memory of the time in which either the courts which protected those interests, or the remedies by which those interests were protected, were different. But the differences between them have ceased to depend upon the law of procedure. The working of the law of procedure has created the great leading distinctions in the substantive part of our land law, and, long after the procedural rules have changed, these distinctions will survive.

(3) *Legal doctrines connected with Tenures and Estates.*

I have already noticed some of the causes which were making the land law complicated. As we have seen, the number of possible persons who might at the same time have interests in the land, the number and variety of the remedies which might be used by them, and the doctrines as to the various seisins protected by these remedies, were the principal causes which made the land law of the thirteenth century the most technical and complicated of all branches of English law. As the consequences of these principles were worked out by the application of the legal logic of the lawyers of the fourteenth and fifteenth centuries to the facts of that turbulent and litigious period, and as the law itself

[1] § 77. Littleton did not write these words (see vol. iii 209); but the part of this section which he did write shows that the law was changing just about this period; the first part of the section represents the old law—"*It is said that* if the lord do oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they should not be said to be tenants at the will of the lord according to the custom of the manor;" the second part which states that the lord cannot break the custom, may not be by Littleton, but it vouches Brian and Danby.

[2] §§ 73-84.

was modified in the process, its complexity increased. Littleton's chapters on such subjects as Descents which toll Entries, Continual Claims, Discontinuances, Warranties, Remitters, Releases and Confirmations, present us with an amazing picture of the final result.

It is difficult to give any short account of this obsolete learning which, at this period, must have supplied the legal profession with the larger part of their practice. It may help us to understand it if we begin by recalling the principle upon which the law of the thirteenth century rested. If A disseised B, B had a right of entry of very limited duration—some four days—which he could assert by the assize of Novel Disseisin.[1] A got the seisin—a tortious seisin, it is true—but still a seisin of the land, which gave him the same rights over the land that he would have had if he had been rightfully seized. B had only a right to recover the land which he could assert by the writs of entry or the writ of right.[2] A and B therefore both had rights, but rights of very different kinds. Similarly C might disseise A with the same results, so that three persons now had claims to the land which might be asserted by different writs. Now the old idea that seisin as such gives, as against third persons, the rights of an owner to the person seised, still survives in our law.[3] But the old rule that these rights were available even as against the true owner, unless he at once asserted his right of entry, tended to disappear. We may still use Maitland's phrase, "the beatitude of seisin," to express the advantages which seisin confers; but we must remember that these advantages were during this period being gradually curtailed as against the true owner. It is the maintenance of the old ideas as to the effect of seisin as regards third persons, coupled with their gradual modification as regards the true owner, which gave rise to many difficult doctrines in the land law of the fifteenth century.

Though the person seised had and still has most of the rights of the owner as against third persons,[4] he gradually ceased to be able to maintain them against the true owner. As against him it was coming to be thought unjust to maintain the seisin of a disseisor, or even of a disseisor's feoffees. The series of cases from 1292 to 1376, which Maitland cites,[5] illustrates the nature of this change, which was noted both by Brooke[6] and Coke.[7] It is clear

[1] Maitland, L.Q.R. iv 29, 30. [2] For these writs see vol. iii. 5-8, 11-14.

[3] As to the rights of the person seised and the consequences of seisin see vol. iii 91-92.

[4] Vol. iii 93-94; Bk. iv Pt. II. c. 1 § 2.

[5] L.Q.R. iv 287-289, Coll. Papers i 436-439.

[6] Brooke, Ab. *Entre Congeable* pl. 85, cited L.Q.R. iv 289.

[7] "In ancient times if the Disseisor had been in long possession, the Disseisee could not have entered upon him, likewise the Disseisee could not have entered upon

that, when Littleton wrote, the idea, which regarded as exceptional any extension of the three or four days within which, in the time of Bracton, the owner must enter, was giving place to the new idea that any fetter on the true owner's right to enter was exceptional.

There were several reasons for this change. Firstly, the lengthening of the period within which a right of entry could be asserted by an assize, owing to the neglect to pass any statutes of limitations, promoted the existing tendency to connect seisin with title.[1] But obviously when seisin has ceased to mean possession pure and simple, and has acquired some connotation of title, it will seem to be unjust to maintain a disseisor's seisin against a man who has an obviously better title. Secondly, owing to the lengthening time within which the true owner could assert his right of entry by an assize, and owing to the tendency to connect seisin with title, the law as stated by Bracton was misunderstood. The fact that when Bracton said that long possession would bar the owner's right of entry, he meant possession for some three or four days, was forgotten ; and, in fact, this misunderstanding was made easy by Bracton's treatment of the subject. The old rule as to the four days was an archaic rule, which he tried to rationalize by calling it long possession, and talking of negligence and acquiescence.[2] The judges adopted his rationalistic reasoning, with the result that the length of time needed to protect a disseisor from a disseisee's right of entry became "a matter for judicial discretion ;" and, in exercising this discretion, "the judges lean towards the owner."[3] Moreover, this extended right to enter upon a disseisor was almost inevitably still further extended to a right to enter upon a disseisor's feoffee—otherwise "every disseisor would have had a feoffee ready to hand."[4] If, for instance, a tenant for life has enfeoffed another in fee, he has committed a wrong. His estate is forfeited and the person next entitled can enter upon that feoffee, since he has come to be regarded as being in some sense a party to the wrong.[5] But why, it may be said, should not the judges have required good faith as a condition of

the feoffee of the Disseisor, if he had continued for a year and a day in quiet possession ; but, the law is changed in both these cases," Co. Litt. 237b ; as to possession for a year and a day see vol. iii 69-70 Maitland says, L.Q.R. iv 289, Coll. Papers i 440, that he has not been able to find definite authority for the rule that a disseisor's feoffee must not be disturbed after a year and a day. For similar changes in the law as to the possession of chattels see vol. iii 351.

[1] Vol. iii 10 ; for this tendency see above 354 ; and cp. Y.B. 18 Ed. III. (R.S.) 26 *per* Willoughby, J.

[2] L.Q.R. iv 296, Coll. Papers i 451-452.

[3] L.Q.R. iv 296, Coll. Papers i 452 ; above 583 n. 7.

[4] Ibid.

[5] L.Q.R. iv 297, Coll. Papers i 454 ; but the rule was not settled till after Bracton wrote, ibid, though it was well settled in Littleton's day, § 415.

protecting the disseisor's feoffee against the owner's entry? The answer is that this could not be done, because, as we shall see,[1] "a psychological investigation of this kind was beyond the means, beyond the ideas of our law," which was then and later dominated by the principle that "the thought of man is not triable."[2] Thirdly, this leaning in favour of owners had been encouraged by the legislature. We shall see[3] that in 1285[4] it had been enacted that if a lessee for years or a guardian aliened in fee, both they and their feoffees were to be accounted disseisors. Therefore the assize will lie against them and the owner can enter upon them. For all these reasons, then, both disseisors and their feoffees were coming to be treated in the same way—both, when Littleton wrote, were losing the protection against the true owner's right of entry, which the law of the thirteenth century gave to them.

But some limitations to this right of entry, some survivals of the old principle, fill a large space in Littleton's book. If A a disseisor dies, and C his heir enters, B's, the disseisee's, right of entry is gone. "Because the law," says Littleton, "cast the lands or tenements upon the issue by force of the descent, so as the issue cometh to the lands by course of law, and not by his own act, the entry of the disseisee is taken away, and he is put to sue a writ of *entrie sur disseisin* against the heir of the disseisor to recover the land."[5] This is the doctrine of tolling (i.e. taking away) entries by descent cast. But the operation of this doctrine could be prevented if B, not being able to enter, had made "continual claim." "When a man," says Littleton, "hath a right and title to enter into lands and tenements, whereof another is seised in fee, or in fee tail, if he which hath title to enter makes continual claim to the lands or tenements before the dying seised of him which holdeth the tenements, then, albeit that such tenant dieth thereof seised, and the lands or tenements descend to his heir, yet may he who hath made such continual claim, or his heir, enter into the lands or tenements so descended by reason of the continual claim made, notwithstanding the descent."[6] Somewhat analogous to the doctrine of "entries tolled by descent cast" is the doctrine of "discontinuance." If A, being a husband seised in right of his wife, or an abbot seised in right of his house, or a tenant in tail,[7] enfeoffed another (B) of the land and died; the person entitled to enter upon the termination of A's interest lost his right of entry, and was obliged to assert his right against B

[1] Vol. iii 374.
[2] L.Q.R. iv. 297, Coll. Papers i 453.
[3] Vol. iii 10.
[4] Stat. West. ii c. 25.
[5] § 385; for the writ of entry surdisseis in see Booth, Real Actions 178, and vol. iii 11-14.
[6] § 414.
[7] L.Q.R. iv 297, 298.

by action. A's feoffment and death was said to have effected a discontinuance or devesting of the estate.[1] In most cases, as we have seen, in the time of Littleton a feoffment in fee by a limited owner involved a forfeiture, the true owner had a right of entry, and could proceed by the assize against the feoffee as a disseisor.[2] These cases of discontinuance were survivals of the old law which rigidly protected seisin even against the true owner.

In fact, the doctrine of continual claim, and the very numerous cases in which the true owners right of entry was *congeable* (i.e. allowable), had profoundly modified the old law.[3] Maitland has very clearly explained the character of this change. "Does the law protect possession against property? If we ask this question in Bracton's day, the answer must be: Yes, it protects possession, untitled and even vicious possession; if O, the owner, has been ousted by P, he must re-eject P at once or not at all; should he do so after a brief delay, then P will bring the novel disseisin against him and will be put back into possession. But if we ask this question in the days of Littleton, the answer must be: No, the common law does not protect possession against ownership, except in those comparatively rare cases in which there has been a descent cast or a discontinuance, one of those acts in the law (their number is very small) which have the effect of tolling an entry."[4] The favour once shown to tortious seisin even as against the true owner has come to look anomalous. The person seised has, as regards third persons, most of the rights of an owner; but it is coming to be thought unreasonable to deprive the true owner of his right of entry merely because the heir of the deceased disseisor has entered, or because the tenant in tail, or husband, or abbot, who made the tortious feoffment has died. Rationalistic and quite unhistorical explanations are invented. "The issue cometh to the land by course of law," is suggested by Littleton as the explanation of the entry tolled by descent cast[5]

[1] Litt. §§ 592-658.

[2] L.Q.R. iv 297, 298 Maitland says, "The discontinuances remain outstanding as exceptional cases. No forfeiture is involved in them; if a husband alienates his wife's land, this of course cannot be a forfeiture; husband and wife are too much one for that: if an abbot alienates the abbey lands, there is no one who can have any right to take the lands from the feoffee so long as that abbot is abbot; as to the tenant in tail, it would have been very difficult to hold that by alienating he forfeited his estate to his own issue. So in these few quite exceptional cases the feoffee comes in without there being any disseisin or any forfeiture; here then the old rule still prevails, he has a seisin of freehold in which the law protects him even against the true owner."

[3] Hale, H.C.L. 211, "The ancient strictness of preserving possession to possessors till eviction by action began not to be so much in use, unless in such cases as descents and discontinuances—the latter necessarily drove the demandant to his formedon or his *cui in vita*, etc. But the descents that tolled entry were rare, because men preserved their rights to enter, etc., by continual claims."

[4] L.Q.R. iv 286.

[5] Litt. § 385; Co. Litt. 237b.

To explain the effect of a discontinuance recourse was had, as early as Edward II.'s reign, to the law of warranty.[1] If, it was said, you allow the rightful owner to re-enter and to recover, the actual tenant will have no opportunity of vouching to warranty the heirs of his feoffer, and of thus securing compensation.[2]

Into the manifold complications of the law of warranty I cannot here enter. The several possible titles which might coexist to one piece of land were usually complicated by obligations on the part of each feoffor and his heirs to warrant the gift which had been made; and such liability to warranty might bar claims which might otherwise have been asserted.[3] It is easy to see that such doctrines opened a fertile field for litigation. We may note, however, that it was in the doctrines as to warranty that a means had been devised of nullifying the effect of the statute De Donis.[4]

The result of these doctrines old and new was that there might be several titles to the same piece of land all existing together. If A has disseised B, and has then alienated to C, and if D has then disseised C, it is clear that D is in seisin, and that C, B, and A all have titles of varying degrees of merit to the land. It was to meet complicated situations such as these that the doctrine of "Remitter" was invented. If, in the case just put, D enfeoffed B, B would be remitted to his original estate; for, says Littleton,[5] "Remitter is an ancient term in the law, and is where a man has two titles to lands or tenements, viz. one a more ancient title, and another a more latter title, and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthy title." It was, in fact, a necessary doctrine to prevent circuity of action, and to prevent the gross injustice which might otherwise have been perpetrated.[6]

[1] Y.B. 8 Ed. II. (S.S.) 110 *per* Hartlepool *arg.*; Brooke, Ab. *Entre Congeable* pl. 48, cited L.Q.R. iv 288.

[2] Litt. § 601 still puts this reason forward somewhat tentatively: Coke, Co. Litt. 237a, has no doubt at all about its correctness—"For the benefit of the Purchaser, and for the safeguard of his Warranty, so as every man's right might be preserved, viz. to the Demandant for his ancient right, and to the Feoffee for the benefit of his warranty . . . which benefit of the warranty should be prevented and avoided, if the entry of him that right had were lawful."

[3] Vol. iii 117-118, 159-160. [4] Ibid 118-120. [5] § 659.

[6] The kind of injustice which this doctrine prevented is illustrated by the working of the rule that there could be no remitter contrary to a record; we have the following case in 1534, Dyer 5a: a man seised of an acre of land had issue two sons, and died; the younger disseised the elder; the elder brought the assize, and failed by reason of the perjury of the jury; the younger then granted a rent charge, and died without issue, so that the land descended to his brother; it was held that the brother could not discharge the land of the rent charge; there could be no attaint owing to the death of the younger brother, and therefore the judgment in the assize stood; that being so, the elder brother could not be remitted to his earlier title, as there could be no remitter contrary to a record; cp. Co. Litt. 349b.

Similar reasons to those which made the doctrine of remitter a useful and a necessary doctrine made the law as to Releases [1] and Confirmations [2] hold a place very different to that which it holds in modern times. By a Release a person disseised could convey his rights to the persons actually seised of his estate in the land. By a Confirmation a person disseised could confirm the land to any one actually in possession of it, whether he was in possession of the disseisee's former estate or of another estate derived out of it, for any interest he pleased. It is easy to see that the variety of titles which might be made to land in the then state of the law, and that the traffic in doubtful titles which the turbulence of the times encouraged, gave the learning as to these assurances great practical importance.

The detail with which these doctrines are explained by Littleton shows us that many of the complications of the land law arose at this period partly from the enthusiasm of the legal profession for the technicalities of a vicious system of procedure, partly from opportunities it afforded to the lawlessness of the age. No doubt a savagely litigious age, and a legal profession whose training and whose technical language made for logical exactness in thought and word, would have put a severe strain upon any—even the best—system of procedure; and, as we shall see, the whole system of procedure then in force, and especially the procedure in the real actions, required either to be replaced or reformed. That it was largely the system of procedure, as used and misused by the legal profession at the bidding of their clients, which was at fault will be the more probable if we remember that the contingent remainder was hardly yet recognized, and that Uses were in their infancy. These two topics, which in the following period were destined to introduce many complications into the land law, could be neglected by a writer upon tenures in the fifteenth century; and yet the law was then almost as complex as it has ever been.

We cannot but admire the grasp of principle, the subtilty in distinguishing, the skill in the application of principles to the facts of concrete cases, which Littleton displays; and we can see that the same qualities were displayed by him and by many other lawyers of this period in other branches of the law—notably in the nascent law of tort and contract. We cannot but regret that these qualities should have been wasted upon the barren technicalities of a worn-out system of procedure; nor can we wonder that a profession which could display such qualities should be able, when released from this incubus, to win for its system

[1] §§ 444-514. [2] §§ 515-550.

the first place in the state. Unfortunately for the land law that incubus was removed, not by the clean and incisive process of direct legislation, but by piecemeal changes and improvements introduced by the legal profession. Many of the old doctrines became gradually dormant, but it was still possible to revive them; and so, although with new doctrines, new complexities were introduced, the old doctrines still influenced the law. But it was impossible to understand the real meaning of these old doctrines without a knowledge of the old procedural rules from which they had originated. When that origin was forgotten, fictitious or a priori reasons were invented; and ignorance of history became the real foundation for much abstract and arbitrary legal doctrine upon such topics as the nature of seisin and the general principles of feudalism.[1] Such doctrine was regarded with the reverence which is always at the disposal of the incomprehensible; and the law became infested with that mysticism which, as Mill has pointed out, was not dispelled till Bentham arose. This process was only just beginning in the days of Littleton. The legal doctrines with which Littleton deals were still understood by the lawyers. They were not as yet based upon a state of facts which had passed away. It is rather to the niceties of the law of procedure that we must look if we wish to see legal doctrines, which had lost their *raison d'etre*, maintained merely by the force of authority and precedent.[2] No doubt he, like other mediæval lawyers, and indeed like all other mediæval thinkers, deduced his conclusions by the process of logical reasoning from the major premises of a few leading principles; and, as we have seen, a very technical body of rules results therefrom. But without some such technicality as this no enduring system of law can ever be created. Here as elsewhere it is difficult to hit the exact mean between excess and defect. It is difficult to give the right weight both to the deductions of logical reasoning and to the incoherence of facts —to be logical without becoming a slave to logical abstractions. Lord Somers, criticizing a dictum that it was "quasi absurdum et impossibile" that a court dissolved one day could be treated as existing the following day and united to another court, once spoke some wise words upon this matter. "We are not now discussing," he said, "upon a subject of philosophy, nor speaking of the natural existence of things. Then indeed it would be absurd to say, that what was dissolved and annihilated one day should yet have such an existence as to be united to anything the day following; but

[1] As Maitland says, L.Q.R. i 340, "In course of time it became easier to read the Libri Feudorum than to read the Year Books;" for the Libri Feudorum see above 142.

[2] Above 515 n. 4, 524 n. 6; vol. iii chap. vi.

we are speaking of a legal subject, touching the construction of a law, where fictions and relations and conclusions have place." [1] I think that Littleton would have subscribed to this doctrine far more readily than he would have subscribed to much of the reasoning of the lawyers in later periods in the history of our law.[2]

But here we are concerned only with the fifteenth century. The doctrines of the seventeenth and the eighteenth centuries were not those of the fifteenth century; nor was the land law at these later periods of the same importance as it was in the earlier. In the fifteenth century it was, and had been for two and a half centuries, the chief part of the common law, and the principal study of the common lawyers.[3] As in the days of Bracton, so in the days of Littleton, many topics which we regard as standing by themselves or as belonging more especially to other branches of law, are noticed chiefly in their application to the land law.[4] By our verdict, therefore, upon the land law the whole system of the common law of the later Middle Ages must in a large measure be judged. Though it cannot be denied that it was in many respects a reasonable and a practical system, and that it trained accomplished lawyers, it must be admitted that it was, in some respects, a less reasonable system in the reign of Edward IV. than it had been in the reign of Edward I. In some branches of the law, indeed, we may discern signs and germs of changes which give promise of reform and development in the future; but in spite of this it is clear that retrogression and futility are as markedly the notes of certain aspects of the legal history of the fourteenth and fifteenth centuries as they are the notes of certain aspects of their constitutional and political history.[5] To a large extent we must ascribe this deterioration to the fact that the development of the principles of the law had, for the last two hundred years, been almost entirely professional. The strength and the weakness of such a development of the law are much the same then as now. Its strength is the logical grouping of confused facts under general principles, the application of those principles

[1] The Bankers Case (1700) 14 S.T. at p. 90.

[2] Litt. §§ 646, 647 admits that the seisin may be in abeyance in two cases; we may be sure that he would not have subscribed to some of the later doctrines of scintilla juris, nor to such reasoning as that employed by Williams, Real Property (2nd ed.) 404 n., when speaking of the Satisfied Terms Act.

[3] Cp. Y.B. 2, 3 Ed. II. (S.S.) 194, "Land is higher than chattels; but if a divorce be made between man and wife, she shall have an action for the higher (the land), and therefore for the lower."

[4] E.g. §§ 335 (tender), 344 (payment), 196-201 (persons under disability).

[5] Stubbs, C.H. ii 680, "Weak as is the fourteenth century, the fifteenth is weaker still; more futile, more bloody, more immoral; yet out of it emerges, in spite of all, the truer and brighter day, the season of more general conscious life, higher longings, more forbearing, more sympathetic, purer, riper liberty."

in detail to new states of fact, the ingenuity with which old principles and old remedies are restricted or extended to meet the new needs, physical, commercial, or moral, of another age. We see these qualities most strikingly displayed in the gradual development of new principles of delictual liability, and new principles of contract, in the recognition of the interest of the lessee for years and the copyholder. Its weakness is caused largely by the very defects which are inherent in its virtues. It cannot take large views as to the state of this or that branch of the law. It can only advance step by step from precedent to precedent. It cannot disregard the logical consequences of its principles, though in practice their strict application may be inconvenient. It is loath to admit new principles, and will not do so unless compelled by such a consideration as the loss of business consequent upon the competition of a rival court. If once a rule or a set of rules have become established they cannot be removed, however great a hindrance they have become. They can only be explained or modified, with the result that the rule with the modifications and exceptions added often becomes a greater nuisance than the original rule itself. We can see from the state of the common law at the end of this period that a purely professional development is not good for the health of any legal system. The unrestrained efforts of a hierarchy of professional lawyers is apt to produce results similar to those attributed by Maine[1] to the unrestrained efforts of a hierarchy of priests: "usage which is reasonable generates usage which is unreasonable."

English law was suffering, as it suffered at the close of the eighteenth century, from a development too exclusively professional. At both periods it stood in urgent need of revision by the light of outside public opinion, if it was to meet the new requirements of another age. This we shall see more clearly when we have examined the serious limitations upon the sphere filled by the mediæval common law.

The Limitations of the Mediæval Common Law

The thirteenth century had reaped the benefits of a fixed and orderly system of law. The fourteenth and fifteenth centuries paid the penalty. They suffered from the effects of a fixity and a precision which were premature, because they involved the elimination of many old ideas and principles which, if developed, might have made for expansion and growth. The law may

[1] Ancient Law 19, 20.

hinder or it may guide the political and social development of the state; it cannot altogether stop it. The want of flexibility in the law prevented a free development of legal doctrine to correspond with changing needs and ideas. In some cases these changing needs and ideas were met by small gradual modifications of doctrine which left the law neither certain nor convenient. But in a large, perhaps the largest number of cases, these needs were not met at all by the common law. We have seen that the jurisdiction of the common law courts was confined within the borders of England, Wales, and perhaps Ireland. The Law Merchant and matters relating to war were beyond their ken; and, looking at continental analogies, we may perhaps admit that there was nothing inconvenient, nothing unusual, in such limitations.[1] But we have seen, too, that, even within its own geographical limits, the common law of the fifteenth century was incapable of devising rules to govern the transactions of a changing society.[2] This was largely due to the fact that the growing formalism and technicality of the common law had banished from it those equitable ideas and principles which had once characterized it.

We have seen that, well on into the fourteenth century, the common law substantive and adjective had retained some of those equitable principles which had been one of its most marked features in the days of Glanvil and Bracton.[3] Even in the fifteenth century the judges sometimes helped the chancellor to arrive at a decision[4] —to the end they advised him on questions of pure law;[5] and the differences between the procedure of the common law and that of the Chancery were not so clear cut as they afterwards became. On the one side there are the Bills in Eyre,[6] and on the other, cases of the type of *Hals v. Hynchley*.[7] But by the latter part of the century the distinction between the law administered by the Chancery and that administered by the common law courts was well marked; and the distinction was accentuated by the growth of the modern separation between the equitable and the common law jurisdiction of the Chancery.[8] But these equitable principles which had thus been banished from the common law were able to give a technical recognition and an adequate protection to many new social and business needs which were emerging at the end of this period. The result was that the recognition and protection which the common law courts were no longer able to give were found in the Chancery. And thus we must ascribe the

[1] Vol. i 543-544, 574-575; above 309-310.
[2] Above 482-484.
[3] Above 334-347.
[4] Vol. i 451; below 594.
[5] Vol. i 451.
[6] Above 337-343.
[7] Vol. i 450; L.Q.R. i 443.
[8] Vol. i 451-452.

division of our law into the two supplementary and often rival systems of common law and equity to the early fixity of its principles, and to their subsequent development by a very close, a very specialized, a very English profession.

That the common lawyers of the fifteenth century would have acquiesced in such strictures upon their beloved system may well be doubted. They would have assigned many errors. They would have pointed out that recognition had been given to the tenure of the copyholder; that the lessee for years had found adequate protection; that the developments of the actions of Trespass and Deceit were quite capable of giving effect to newer ideas of civil liability, contractual and delictual; that the existence and objects of the writ *Audita Querela*,[1] by which a judgment could be reconsidered upon equitable principles, showed that they were not indifferent to the claims of abstract justice, nor blindly wedded to their fixed forms; that developments had taken place in certain of the real actions, which enabled them to be used to remedy not only a completed wrong, but also to prevent an anticipated wrong.[2] If they had been pressed by the objection that their procedure unduly delayed justice they would probably have replied like good lawyers that the law will "more readily suffer a delay than an inconvenience;"[3] and they would have placed upon the executive government the responsibility for that turbulence and disorder, which knew well how to make use of the defects in the law, pointing to the severity of its rules as to maintenance, champerty, and such-like offences.

The truth of these pleas we should be obliged to confess; but we should seek to avoid them in part by pointing out that the interest of the cestuique use had wholly slipped from the grasp of the common lawyers; and that, by their own confession, his interest was to be governed by the law of the Chancery and not by the common law.[4] We might also point out that the interest

[1] Y.B. 17 Ed. III. (R.S.) 37 *Stonore*, C.J., says, "I tell you plainly that Audita Querela is given rather by equity than by common law, for quite recently there was no such suit;" Y.B. 18 Ed. III. (R.S.) 308 Pole, *arguendo*, says, "Audita Querela was given quite recently, that is to say in the tenth year of the reign, in Parliament, on account of the mischief, and it was never given before;" and cp. Y.B. 20 Ed. III. (R.S.) i 92, 94; for the writ see vol. i 224.

[2] Above 344 n. 6.

[3] See Fortescue, De Laudibus c. 53, "It is necessarie that delaies be had in the processes of all nations, so that the same be not too excessive. For by reason thereof, the parties, and chiefly the partie defendant, doe oftentimes provide themselves with good defences, and also of counsels;" however, the fact that the Prince (c. 52) objects to the law because of its delays shows that they were notorious; cp. Y.B. 35 Hy. VI. Mich. pl. 27 *per* Prisot, C.J.

[4] Y.B. 4 Ed. IV. Pasch. pl. 9 *Moile*, J., said, in answer to a defendant's plea in an action of trespass that he was a c.q. use, "C'est bon mater d'estre en le Chancery, car la defendant la averera l'entent et purpose sur tiel feoffement, car per conscience de ce en le Chancery home avera remedy sur l'entent de tiel feoffement; mes icy per

of a man on whose account another held land or chattels had been, and in some cases was, recognized by the law;[1] that even the villein, for instance, might hold property as the executor of a deceased person;[2] that breaches of trust were sometimes almost recognized by it;[3] that the Use was familiar to the legislator;[4] and that it therefore argued a strange blindness in the common lawyers to have found no place in their system for so common an interest. What the reply of our lawyer of the fifteenth century would have been can only be conjectured. Probably he would have touched somewhat upon the fraudulent purposes which Uses were employed to effect; and perhaps he might have argued that for all lawful purposes common law conditions might be made to serve.[5] It is possible, too, that he would have pleaded that the refusal to recognize the Use sprang not from the incapacity of the law or the lawyers, but from deliberate preference, alleging as proof the fact that the judges and the serjeants, by giving their assistance to the chancellor in his decisions upon such questions, helped to mould the law relating to them. Quite at the end of the fifteenth and at the beginning of the sixteenth century it

cours de comen ley en le comen Bank ou Bank le roy, auterment est, car le feoffee avera la terre, et le feoffor encontre son feoffement demesne ne justifiera;" cp. Y.B. 5 Hy. VII. Mich. pl. 11.

[1] Red Book of the Exchequer (R.S.) iii 1019; Ramsey Cart. (R.S.) ii no. 367; Y.B. 2 Hy. IV. Trin. pl. 2; 22 Ass. pl. 72 f. 101—a fraudulent gift of cattle to evade execution, *Thorpe* said, "Jeo tien que celui a qui tiel don fuit fait le fist fors gardein des bestes al œps l'autre;" Y.B. 39 Hy. VI. Hil. pl. 7 cited vol. iii 426 n. 2; F.N.B. 205 G., "If a woman do enfeoff a stranger by deed of land in fee to the entent to enfeoff her and one who will be her husband; if the marriage doth not take effect she shall have writ of *Causa Matrimonii Prælocuti* against the stranger, notwithstanding that the deed of feoffment be absolute;" Thomas of Weyland's Case, R.P. i 66 (19 Ed. I. no. 1); Litt. § 79; on the whole subject see Bk. iv Pt. I. c. 2.

[2] Litt. §§ 191, 192.

[3] Litt. § 383—an executor bound to sell the testator's lands for the good of his soul kept the lands for two years and pocketed the profits, "*Mowbray*, Justice, said, The executor in this case is bound by the law to make the sale as soon as he may after the death of his testator, and it is found that he refused to make sale, and so there was a default in him; and so by force of the devise he was bound to put all the profits coming out of the lands to the use of the dead, and it is found that he took them to his own use, and so another default in him. Wherefore it was adjudged that the plaintiff should recover."

[4] Bk. iv Pt. I. c. 2.

[5] Litt. §§ 353-358; in § 355 he says, "If a feoffment be made upon condition to enfeoff another, or to make a gift in tail to another, etc., if the feoffee before the performance of the condition enfeoff a stranger . . . then may the feoffor and his heirs enter, etc., because he hath disabled himself to perform the condition;" for illustrations see Y.BB. 18 Ed. III. (R.S.) 122, 124; 18, 19 Ed. III. (R.S.) 492 seqq.; in Y.B. 14 Hy. VIII. Mich. pl. 5 (next note), where Fitzherbert and Brooke see proof that Uses were at common law, Brudnel sees only a right of entry for condition broken such as is dealt with by F.N.B. 205 G. (above n. 1); the great defect of these conditional feoffments was that if a person, other than one of the parties to the arrangement, was to benefit by the nonfulfilment of the condition, he could not enforce it, cp. 18, 19 Ed. III. (R.S.) 526; that these feoffments were sometimes used, like Uses, to get a powerful protector appears from the note from the record in Y.B. 18, 19 Ed. III. (R.S.) 525.

might perhaps have been boldly argued that "Uses were at common law." No doubt there was some authority for this view in certain dicta and decisions of Henry VII. and Henry VIII.'s reigns, which were based upon scattered hints and rulings—the survivals of a time when the common law yet retained some of its old elasticity;[1] and we may see perhaps an attempt to give legal force to it in the famous Statute of Uses. It is certainly significant that in the same year as that in which the Statute of Uses was passed all the judges agreed that "the common law is but common reason, and common reason bids one trust another, and a Use is a trust between feoffor and feoffee; which trust is by common reason, and common reason is common law; and therefore it follows that the Use is at common law."[2] But this was hardly the view of the lawyers of Edward IV.'s reign. They could hardly have made such assertions, and probably would not have wished to do so. The Use was the creature of the Chancery, and the law of the Chancery and the common law were different things.[3] Probably they would have doubted the expediency of permitting such things as Uses; and, apart from jurisdiction over things, the existence of which they desired as far as possible to ignore,[4] they would have assigned to the Chancery the subordinate and supplementary position of, where possible, preventing fraud.[5]

I have admitted that, at the end of this period, there are some signs of the manner in which the common law will be developed in the following period. But it was largely the competition of the Chancery which had made the common lawyers ready so to

[1] Y.B. 14 Hy. VIII. Mich. pl. 5, *Fitzherbert* says, "Les uses sont al Common Ley et use n'est forsque trust et confidence que le feoffor met en le person de son feoffee . . . car si feme seisie de terre al Common Ley veut sur communication de marriage enfeoffer un, s'il ne performe cest trust la Ley done a luy remedy de recoverer son terre arere per breve d'entre *causa matrimonii prælocuti*;" *Brook* agrees; but *Brudnel* dissents—"A ceo que est dit que la feme avera brief, etc., que ceo par reason del trust, ceo n'est issint: car appert en *Natura Brevium* que le feffement sur que cest action sera ground covient estre par fait endente, et ceo prove ceo d'estre un condition, et donque est come d'auters conditions;" for Bacon's views on this matter see Bk. iv Pt. I c. 2.

[2] Y.B. 27 Hy. VIII. Pasch. pl. 22.

[3] Y.B. 4 Ed. IV. Pasch. pl. 9 Catesby, *arguendo*, says, "La Ley de Chancery est le commen ley del Terre;" to which *Moile*, J., replies, "Ceo ne poit estre icy en cest courte come j'ay vous dit, car le commen ley de Terre en ce case varie de la ley de Chancery en cel point."

[4] See Maitland, Equity 32.

[5] See Y.B. 37 Hy. VI. Hil. pl. 3, *Prisot*, C.J., said that upon writs of subpœna the Chancery can only examine the conscience of the party; that the common law courts, on the other hand, must observe the law and could not consider conscience, nor the results of an examination into conscience; that when the common law courts had no jurisdiction Chancery could order restitution, acquittance, or release; but that to give effect to its orders the court could only order the party to prison till he complies, "et si la party voit giser en prison plustost que deliverer l'obligation l'auter est sans remedie."

mould their scheme of writs as to admit of such development.[1] It was, however, no small piecemeal changes which would suffice to meet the requirements of the age. What was wanted was rather a new system which, untrammelled by the complicated technicalities of the common law, could start from the basis of that common law, and devise in a new atmosphere new rules to meet the needs of a changed condition of society. Even in the eighteenth and nineteenth centuries the attempt to administer equity through common law forms did not meet with success.[2] It was in the new court of Chancery alone that there could be found the free and youthful vigour needed for the task. That court then possessed in some measure the qualities which had animated the founders of the common law in the twelfth and thirteenth centuries, and it was exactly those qualities that were needed to introduce new blood into our legal system. Like the common law courts of the thirteenth century, it was closely related to the king, and therefore able to administer that equity which it was the prerogative and the duty of the king to apply, in order to prevent the law from working injustice. This is very well expressed in some words attributed to the chancellor by a Year Book of Edward IV.'s reign: "It was said by the chancellor that in the Chancery a man shall not be prejudiced by mispleading or by defects of form, but he shall be judged according to the truth of his case; and we must judge according to conscience, and not according to the things alleged by the parties; for if a man supposes by his bill that one has wronged him, and the defendant says nothing, and we know that he has done no wrong to the plaintiff, he will recover nothing. And there are two manners of powers and processes in the Chancery—the Ordinary and the Absolute power. The Ordinary power is the power in which a certain order is observed, just as it is observed in positive law; but the law of nature has no certain order, but it acts by any means that the truth may be known, etc., and therefore its procedure is called Absolute, etc." [3]

[1] Above 456; vol. iii 436, 442, 447; vol. i 456.

[2] See L.Q.R. i 455 seqq. for an account of an attempt made in this direction by the state of Pennsylvania. That state did not get a court of equity till 1836. As in England, the common lawyers pointed out that many common law writs could be made to do the work of equitable remedies; thus, in 1809, the Assize of Nuisance was used as a substitute for an injunction; cp. vol. i 636.

[3] Y.B. 9 Ed. IV. Trin. pl. 9, "En le Chancery fuit touche per le Chancelor que home ne serra prejudice per mispleder ou pur defaut de fourme, mes solonque le verity de son matter; et nous avomus adjudger secundum conscientiam et non secundum allegata, car si home suppose per bill que un ad fait tort a luy et le defendant ne dit rien, si nous avomus conusance que il n'ad fait tort al plaintiff, il ne recovera rien. Et sont ii maners de poyars et processes s. potentia ordinata et absoluta. Ordinata est l'ou un certein order est observe, come en ley positive, mes ley de natura non habet certam ordinem, mes per quecunque meanes que le verity poit estre

In the seventeenth century this distinction between Ordinary and Absolute power will play a great part in politics. But, in this, its early legal application, to explain the difference between the common law administered in the common law courts and the equity administered in the Chancery, it very neatly expresses the reasons for the growth of a system of equity, and the difference between the equity and the common law of the fifteenth century. As it was the hardness and the technicality of the common law rules which had caused the need for the interference of the equity of the Chancery, this equity necessarily "followed the law" —supplementing it and correcting it. Consequently we cannot understand either the nature of these equitable principles, or the manner of their development, till we have examined in some greater detail a few of the principal legal doctrines of the common law of the Middle Ages.

conus, etc., et ideo dicitur processus absolutus, etc.;" see vol. i 449-452 for the Ordinary and Absolute, i.e. the common law and the equitable powers of the chancellor.

APPENDIX

I

NOTE ON THE HISTORY OF THE PUBLIC RECORDS

"IN England," says Cooper,[1] "the national archives have from the earliest periods been preserved in fixed repositories, and no foreign enemy has, for the space of seven centuries, been in possession of our capital. In the troubles indeed in the reigns of Stephen and John, in the Barons' wars, and afterwards in the conflicts between the Roses, these sanctuaries are supposed to have been violated; and Prynne accuses the respective parties, as they prevailed, of having embezzled and suppressed such instruments as made against their interests. With this inconsiderable exception we are in possession of authentic and valuable instruments from the time of the Conquest, and of parliamentary records and proceedings from a period but little subsequent to it." In Edward II. and III.'s reigns both Parliament and the crown made some provision for the preservation and arrangement of the public records.[2] Statutes provided against their falsification and embezzlement.[3] The measures taken were not able to cope with the increasing mass of these documents. In the Tudor period the various secretaries of state retained many important state papers when they left office. With the object of preventing this leakage, and of making some permanent provision for the custody and arrangement of these papers, the State Paper Office was established in 1578. Dr. Thomas Wilson was placed at its head with the title of "clerk of the papers." His nephew and successor, Sir Thomas Wilson, made some efforts in James I.'s reign to recover lost papers and to arrange the contents of his office. His arrangement of them into the Domestic and Foreign Series has lasted till the present day.[4] In William III.'s reign the compilation of state papers known as Rymer's Fœdera was begun. It

[1] Public Records i 4. [See now Hall, Studies in English Official Historical Documents.]

[2] 14 Ed. II. the king ordered the treasurer and the barons of the Exchequer to arrange the records of his ancestors then in the Treasury and the Tower touching the Exchequer; in the sixteenth and nineteenth years of the same reign similar orders were given to various persons with respect to other records; in the thirty-fourth and thirty-sixth years of Edward III.'s reign the king directed repairs to be made in the house in the Tower where the rolls were kept, cited Cooper, Public Records i 17, 18.

[3] 9 Edward III. st. 1 c. 5; 8 Richard II. c. 4; 11 Henry IV. c. 3; R.P. ii 314 no. 43 (46 Ed. III.); Reeves, H.E.L. ii 239, 240; R.P. v 30 (18 Hy. VI. no. 43).

[4] Scargill-Bird, Guide to the Documents in the Public Record Office (R.S.) xxxviii.

contains papers relating to all departments of government. It is most complete in its collection of papers relating to foreign affairs.[1] In Anne's reign the House of Lords, on the motion of Halifax and Somers, set on foot an enquiry into the domestic records. That enquiry proceeded throughout the reigns of Anne and George I. In 1731 the fire which nearly consumed the Cottonian library induced the House of Commons to set on foot a more extensive enquiry.[2] In 1764 a committee reported that there were no regular calendars or indexes to the records, and that such catalogues as existed were not complete. A commission which was appointed to remedy these defects did little but sort and arrange.[3] No further step was taken till 1800.

All of these enquiries were partial and incomplete.[4] None had produced any permanent measure for the preservation and arrangement of the records.[5] Their keepers were interested not so much in the records themselves, as in the fees which they could exact for their inspection.[6] Prynne in Charles II.'s reign described the records in the Tower as one confused chaos, buried under corroding, putrefying cobwebs, dirt, and filth in the dark corners of Cæsar's chapel in the White Tower. They were in a similar condition in 1800.[7] Hunter[8] cites the following entry in the minute book of the Record Commissioners: "On Wednesday the 28th of June, 1809, and the three following days, Mr. Meaking of the Chirographer's Office brought and delivered into the Record Office at the Chapter House ten large cartloads of the transcripts of Fines, each load being about one ton weight, and the number of bundles being above fourteen hundred. . . . Some of these bundles were brought from under the Temple Church, where, from the dampness of the place, and a constant accumulation of filth and dirt, many of them are rendered almost useless, and many half-destroyed through lying in the wet, whereby they are become so fixed together as not to be separated without breaking them in pieces. The smell arising from the sad condition they were in rendered the arrangement of them, etc., very disagreeable and unhealthy. The later bundles were kept at the Chirographer's Office, and are in good preservation, but many of them are not so well arranged as they might have been. The files of very many bundles had been, through the incaution of persons making researches, cut, whereby many thousand transcripts, during various reigns, years, and terms, were thrown into confused masses." In fact, the lapse of time during which no measures at all had been taken with regard to the increasing mass of the records added constantly to existing difficulties, not only as to arrangement but also as to housing. The regular places for their deposit—the Chapter House at Westminster, the Exchequer buildings, the Rolls Chapel, and the Tower—were too small to contain them, and were ill adapted for the purpose. Many were buried in the vaults of the Temple Church, in the vaults of

[1] Cooper, Public Records ii 89-144; Gross, Sources of English History nos. 2097-99.

[2] Cooper, Public Records i 12-16. [3] Scargill-Bird, Guide xxxix.

[4] No enquiry had been made into the records of the maritime and ecclesiastical courts, into the cathedral or university libraries, or into the royal, Sloanian, Harleian, and other collections now at the British Museum, Cooper, Public Records i 16. [5] Ewald, Our Public Records 12.

[6] Pamphlet on the perilous state and neglect of the public records, cited by Ewald 13.

[7] Address of the House of Commons to George III. in 1800.

[8] Hunter, Fines (R.C.) i xviii, xix.

the White Tower close to the powder magazine, in the vaults of the Wakefield Tower close to a steam engine in daily use, in the stables at Carlton House, in sheds in the King's mews at Charing Cross, in sheds in the Rolls garden.[1]

Our very wealth of records had made us careless of their preservation, and had embarrassed us in their use.[2] How many have never reached their proper custody will never be known. Bracton was one borrower of records—and but for his borrowings the history of English law in the thirteenth century would have been very obscure to all succeeding generations.[3] But for other borrowings we should not have possessed collections like the Lansdowne, the Cotton, and the Harley MSS.[4] Statutes and writs would seem to show that there were other borrowers who made no such use of their borrowed materials.[5] From time to time the records had been officially searched to settle some practical question—it might be a controversy upon some fundamental question of constitutional law, such as agitated the minds of the lawyers and statesmen of the seventeenth century; it might be a controversy between the crown and the subject, such as Lord Somers decided in the Banker's Case; it might be some purely private question at issue between two individuals. Except for these practical purposes they had hardly ever been consulted. Occasionally, indeed, historians had arisen who refused to base their story upon any but the best evidence.[6] For the majority the study of the records under the then existing conditions was, to use Prynne's expression, too "heroic."

It was not till the report of the committee of the House of Commons which led to the appointment of the Record Commission of 1800 that any serious measures were taken to remedy the existing want of system. "During the thirty-seven years of their activity the commissioners spent much money in printing the records of England, Wales, and Scotland, but accomplished very little for their care or preservation."[7] There were many acrimonious discussions as to the adequacy of the editorial work. In 1838 the Public Record Act was passed.[8] The Act established one Record Office, and made provision for the custody of the records and for their use by the public.[9] The Master of the Rolls,

[1] Ewald 16-18. It was said in the report of the select committee of 1836 that among the records in the king's stables six or seven perfect skeletons of rats were found. Gross, Sources 55, citing Hardy's memoirs of Lord Langdale ii 112, 143, says that there were over sixty record offices at the beginning of the nineteenth century; cp. the state of the courts at this period, vol i 648-649.

[2] It is said that the rolls of the Court of Common Bench for Henry VIII.'s reign consist of 102,566 skins of parchment, Pol. Science Quarterly iv 643 n. i; the Close rolls number over 18,000, Scargill-Bird, Guide iii, iv; the Common Bench plea rolls 1 Henry VIII. to 1859 number 3,084, and one roll of the Tudor and Stuart period often contains from 500 to 1,000 skins, ibid iv. For a further account of the Common Bench rolls see Y.B. 18 Ed. III. (R.S.) xviii seqq.

[3] From the plea rolls in his possession he compiled his Note Book, above 233.

[4] Scargill-Bird, Guide xxxviii; Nicolas, Privy Council Records v *iii-v.*

[5] Above 599 n. 3; vol i 104 n. 9 as to the records of the Forest Eyre.

[6] The names of Selden, Cotton, Prynne, and Hale in the seventeenth century, of Spelman, Dugdale, and Madox in the eighteenth century, may be mentioned as illustrious examples.

[7] Gross, Sources 56; Scargill-Bird, Guide iii, iv. [8] 1, 2 Vict. c. 94.

[9] Mr. Gairdner tells us, Paston Letters Preface i 23 (ed. 1904), that the Record Office when first constituted "was supposed to exist for the sake of litigants who wanted copies of documents rather than for that of historical students who wanted

assisted by a deputy keeper created by the Act, was made their custodian. Since 1840 the deputy keeper has issued annual reports upon the records. In 1856-9 the records were removed to the present Record Office. Even now, in the opinion of the most competent judges, our arrangements are still inferior to those of the methodical Frenchman and the laborious German.[1] The Englishman, having devised by practical experiment a workable system of government and a reasonable system of law, is still content to leave to the foreigner the task of elucidating the history of his achievements.

II

THE LAW OF NATURE AND THE COMMON LAW

Throughout the Middle Ages the Law of Nature, identified by Gratian with the law of God, was regarded by the canonists and civilians as the reasonable basis of all law (Pollock, Journal of Society of Comparative Legislation [1900] 418 seqq.). If no actual provision of positive law applicable to the case in hand could be discovered it was assumed that the law of nature must decide the difficulty; and thus statements about the rules of the law of nature expressed the views which this or that lawyer took as to the most reasonable or the most expedient way of solving a legal problem (Pollock loc. cit. 426). In English law not so much is heard of the law of nature. A writer who glossed a MS. of Bracton at the end of the thirteenth century said, in reference to the English king's claim to dominion over the sea, that, "In Anglia minus curatur de jure naturali quam in aliqua regione de mundo" (Bracton and Azo [S.S.] 125). As Sir F. Pollock says (loc. cit. 429, 430), "The canon law was the principal vehicle of the law of nature, and canonists were anything but popular among English lawyers. In politics they were associated with attempts to encroach upon the king's authority for the benefit of foreigners, in common life with the meddling and vexatious jurisdiction of the spiritual courts." But it sometimes makes its appearance in the English courts. Thus it appears as the basis of the Law Merchant (Y.B. 13 Ed. IV. Pasch. pl. 5, vol i 405). Fortescue has a good deal to say of it in his various works. Thus in the De Laudibus c. 16 it appears as the basis of all law (above 569); though he regards it as distinct from the law of God (above 569 n. 3). As a matter of fact, the work done elsewhere by the law of nature was done in England by "reason" (Pollock loc. cit. 432, citing from The Doctor and Student). This use of reason comes out clearly enough in the Year Books. Thus in Y.B. 15 Ed. III. (R.S.) 126 *Mowbray* says, "Law ought to be in accordance with reason and to take away mischief"; and from this he concludes that defects of procedure may be amended by the court without Parliament in order that obvious hardship may be avoided. In Y.B. 8 Ed. IV. Mich. pl. 9 this identity between the use made by the common lawyers of reason or

to read them with other objects." Each clerk had his own province, and could not travel beyond it; so that it was rare to find any one who knew much outside it. Romilly when M.R., by reforming the rules of the office and by instituting the Rolls Series, taught the nation that history could and should be written by the light of the documents which it contained.

[1] Maitland, Y.B. 1, 2 Ed. II. (S.S.) xxxii, iii.

expediency and the use made by the canonists and civilians of the law of nature is in terms admitted. Yelverton says, "Nous serromes ore en ce case sicome les canonists et civilliones face quant un novel cas arrivent de que ils n'ont nul ley a devant; donques ils resorter a ley de nature que est le ground de touts leys, et selonc que ce que est avise a eux estre pluis beneficial a·le Commen Weale, etc., ils font, et issint ore ferromus nous. Si nous ferromus un positive ley sur cel point nous devomus voier ce que est pluis necessary a le Commen Weale et selonc ce que faire nostre ley." These views have been in substance repeated in this twentieth century. "The law of nature," says Professor Dicey, "has often been a name for the dictates of obvious expediency. The privileges, for example, of the nobles under the *Ancien Règime* were in 1789 palpably opposed to the welfare of the French people. Bentham would have said that they were opposed to the principle of utility. A French reformer would have alleged that they were opposed to the law of nature. But this difference of language was at bottom little more than a different way of describing one and the same fact, viz., that the welfare of France required the establishment of equal civil rights among Frenchmen. Towards the close, indeed, of the eighteenth century appeals to the doctrine of utility and appeals to the law of nature were often in reality, though not in words, appeals to one and the same principle" (Law and Opinion in England 143, 144). This similarity in phrasing is not accidental; and it supplies the strongest of all proofs of the continuity of the ideas of the common lawyers upon this matter. Similarly this appeal to reason and expediency has led in later law to talk about the distinction between *malum prohibitum* and *malum in se*, to the notion that even a statute which is unreasonable could not be enforced (Pollock loc. cit. 433; above 442 n. 2), and to the practical rule that a custom will not be enforced if it is not reasonable. With respect to this last point the connection between the common law appeal to reason and the continental appeal to nature has been very clearly expressed by Parker, J., in *Johnson v. Clark* (1908) 1 Ch. at pp. 311, 312. "It is clear," he says, "that for a custom to be good it must be reasonable or, at any rate, not unreasonable. The words 'reasonable or not unreasonable' imply an appeal to some criterion higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with these rules or maxims. . . . A custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system. . . . Take a custom for an infant to dispose of his real estate. In pleading such a custom it is necessary to state definitely the age at which this may be done; and a custom for an infant to dispose of his real estate as soon as he could count twelve would be a bad custom (cp. above 547). This is sometimes put on the ground of uncertainty, but there is another reason, namely, that the court must consider whether the age at which the custom permits an infant to dispose of his realty is an age of discretion, for 'custom'—as it is put in *Needler v. Bishop of Winchester* (Hob. 220, 225)—'must not deprive the law of nature.' Lawyers of to-day do not refer to the law of nature as freely or confidently as lawyers did centuries ago; but, translated into more modern phraseology, I think this means that a custom for an infant of, say, two years to dispose of his realty, even though he could count twelve,

would be a bad custom, because an infant of two years could not have discretion or judgment necessary, according to the principles of our common law, for any voluntary alienation of property. In other words, the custom would be unreasonable because inconsistent with the principles governing all voluntary alienation at common law."

III

A LIST OF THE STATUTES OF UNCERTAIN DATE

(The references are to vol i of the Record Commissioners' edition of the Statutes.)

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IV

LITTLETON'S TABULA

THE FIRST BOOK

is of estates which men have in lands and tenements: that is to say:—

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Of Tenant in Fee Tail	2
Of Tenant in Fee Tail after Possibility of Issue Extinct	3
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Of Tenant in Dower	5
Of Tenant for Term of Life	6
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Of Tenant at Will by the Common Law	8
Of Tenant at Will by the Custom of a Manor	9
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THE SECOND BOOK

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Of Homage	1
Of Fealty	2
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Of Knight's Service	4
Of Socage	5
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Of Homage Ancestral	7
Of Grand Serjeanty	8
Of Petit Serjeanty	9
Of Tenure in Burgage	10
Of Tenure in Villeinage	11
Of Rents	12

And these two little books I have made to thee for the better understanding of certain chapters of the Ancient Book of Tenures.

THE THIRD BOOK

	CHAP.
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V

THE GROWTH OF THE REGISTER OF ORIGINAL WRITS

A

The writs contained in Glanvil's Treatise :—

(1) Præcipe quod reddat (i 6).

Then come the following writs relating to matters which might arise in the course of such an action, *i.e.* Writ warranting the absence of a party in the king's service (i 8); writ to sheriff to seize the land of a defaulter (i 13); writ to the sheriff to seize a false essoiner (i 14); writ to the sheriff to seize a person who has not warranted an essoin (i 15); writ to deliver possession (i 17); writ to enquire into the truth of an illness alleged as an essoin (i 19); writ to view the land (ii 2); writ to give possession as the result of the action (ii 4); writ to summon a person vouched to warranty (iii 3).

(2) Prohibition to the lord when the tenant has put himself on the Grand Assize (ii 8, 9).

Writ to summon the electors of the Grand Assize (ii 11); writ to summon the recognitors of the Grand Assize (ii 15); writ to deliver land when the Grand Assize has given its verdict.

(3) Writ of right of advowson (iv 2).

Writ to take the advowson into the king's hand when there has been no appearance (iv 4).

(4) Summons to a clerk to say quo advocato se tenet in ecclesia (iv 8).
(5) Prohibition to the ecclesiastical court (iv 13; xii 21).
(6) Summons on breach of the writ of prohibition (iv 14; xii 22).
(7) Writ to the sheriff to put a plea of villeinage (de libertate probanda) before the king's court (v 2).
(8) Writ of right of dower (vi 5).

Writ to the heir to warrant dower (vi 9).

(9) Pone (vi 7).
(10) Writ of dower unde nihil habet (vi 15).
(11) Admeasurement of dower (vi 18).
(12) Quod stare faciat rationabilem divisam (vii 7).
(13) Writ to the bishop to make enquiries as to legitimacy (vii 14).
(14) Writ de fine tenendo (viii 4).
(15) Quod recordari facias (viii 6, 7, 10).
(16) De homagio capiendo (ix 5).

Writ to enquire whether a lord has the better right to hold in demesne or in service (ix 7).

(17) Writ of customs and services (ix 9).
(18) Writ against a tenant who has encroached on his lord (ix 12).
(19) De rationalibus divisis (ix 14; xii 16).
(20) Debt (x 2).
(21) De plegiis acquietandis (x 4).
(22) To mortgagor to pay the debt and release the land pledged (x 7).
(23) Writ against the mortgagee to give up the land (x 9).
(24) Writ to summon the warrantor of a chattel (x 16)

(25) Writ to admit an attorney (xi 2).
(26) Breve de recto tenendo (xii 3, 4).
(27) Ne injuste vexes (xii 10, 15).
(28) De nativo habendo (xii 11).
(29) Replevin (xii 12).
(30) Admeasurement of pasture (xii 13).
(31) Quod Permittat (xii 14).
(32) Quod facias tenere rationabilem divisam (xii 17).
(33) To restore chattels taken in the course of a disseisin (xii 18).
(34) To delay a recognition (xii 19).
(35) De rationabile dote (xii 20).
(36) The Assize of Mort d'Ancestor (xiii 3).
(37) The Assize of Darrein Presentment (xiii 19).
(38) The Assize of Utrum (xiii 24).
(39) The Assize of Novel Disseisin (xiii 33).

B

A list of writs contained in a Cambridge MS. (Ti. vi 13) of the early years of the reign of Henry III., summarized by Professor Maitland in the H.L.R. iii 113-115.

The writs contained in a slightly earlier register sent to Ireland in 1227 (H.L.R. iii 110) are denoted by the symbol "Hib."

The notes are Professor Maitland's.

(1) Writ of Right addressed "Roberto de Nevill"; with several variations. (Glanv. xii 2; Hib. 4.)
(2) Writ of Right "*de rationabili parte.*" (Glanv. xii 5.)
(3) *Præcipe in capite.* (Glanv. i 6; Hib. 4.)
(4) *Pone;* this will only be granted to a tenant "*aliqua ratione precisa vel de majori gratia.*" (Hib. 53.)
(5) Writs of peace when tenant has put himself on grand assize. (Glanv. ii 8, 9; Hib. 16.)
(6) Writ summoning electors of grand assize, "*et nota quod in hac assisa non ponuntur nisi milites et precise jurare debent.*" (Glanv. ii 11; Hib. 17.)
(7) *De recordo et judicio habendo.*
(8) *Procedendo* in writ of right.
(9) Respite of writ of right so long as tenant is "*in servicio nostro in Pictavia vel in Wallia cum equis et armis per preceptum nostrum.*" Respites (Hib. 41) where a tenant or vouchee is an infant.
(10) *Warrantia Cartæ.* (Hib. 24.)
(11) Entry "*ad terminum que preteriit.*" (Cf. Glanv. x 9; Hib. 25.)
(12) Entry "*cui in vita.*" (Hib. 26.)
(13) *De homagio capiendo.* (Glanv. ix 5; Hib. 27.)
(14) Novel disseisin;[1] limitation "*post ultimum reditum domini J. patris nostri de Hybernia in Angliam.*" (Glanv. xiii 33; Hib. 5.)
(15) Novel disseisin of pasture; same limitation. (Glanv. xiii 37; Hib. 6.)
(16) Mort d'Ancestor;[2] limitation "*post primam coronacionem R. Regis avunculi nostri.*" (Glanv. xiii 3, 4; Hib. 8.)
(17) *De nativo habendo;*[2] same limitation. (Glanv. xii 2; Hib. 30.)

[1] I believe that this writ would have been antiquated after 1229.
[2] These writs seem older than 1237.

(18) *De libertate probanda.* (Glanv. v 2; Hib. 31.)
(19) *De rationabilibus divisis.* (Glanv. ix 14; Hib. 32.)
(20) *De superoneratione pasturæ.* (Hib. 33.)
(21) Replevin. (Glanv. xii 12, 15.)
(22) *De pace regis infracta;* writ to attach appellee by gage and pledge in case of robbery or rape. (Hib. 34.)
(23) *De morte hominis;* writ to attach appellee by his body. (Hib. 34.)
(24) *De homine replegiando.* (Hib. 35.)
(25) Services and customs; a "*justicies.*" (Glanv. ix 9; Hib. 36.)
(26) *Ne injuste vexes.* (Glanv. xii 10; Hib. 27.)
(27) Debt; a "*justicies*"; "*reddat B x sol. quos ei debet ut dicit, vel cartam quam ei commisit custodiendam.*" (Glanv. x 2; cf. xii 18; Hib. 38.)
(28) Prohibition to ecclesiastical judges against entertaining a suit touching a lay fee. (Glanv. xii 21; Hib. 39.)
(29) Similar prohibition to the litigant. (Glanv. xii 22.)
(30) Prohibition in case of debt or chattels, "*nisi sint de testamento vel matrimonio.*"
(31) Attachment for breach of prohibition. (Hib. 40.)
(32) *De pledgiis acquietandis.* (Glanv. x 4; Hib. 43.) Also (32*a*) a writ forbidding the sheriff to distrain the surety while the principal debtor can pay. (Hib. 46.)
(33) Mesne. (Hib. 47.)
(34) Aid to knight lord's son or marry his daughter.
(35) *De excommunicato capiendo.* (Hib. 48.)
(36) Covenant; *justicies*; "*de x acras terre.*" (Hib. 49.)
(37) Writ announcing appointment of attorney.
(38) Writ to send knights to hear sick man appoint attorney. (Hib. 29.)
(39) Writ sending knights to view essoinee. (Hib. 28.)
(40) Darrein presentment. (Glanv. xiii 19; Hib. 9.)
(41) Prohibition in case touching advowson. (Glanv. iv 13; Hib. 14.)
(42) Writ of right of advowson. (Glanv. iv 2; Hib. 13.)
(43) Writ to bishop for admission of presentee. (Hib. 12.)
(44) *Quare incumbravit.* (Hib. 11.)
(45) Attachment for breach of prohibition. (Glanv. iv 14; Hib. 11.)
(46) Dower "*unde nihil habet.*" (Glanv. vi 15; Hib. 18.)
(47) Dower "*de assensu patris.*" (Hib. 19.)
(48) Dower in London.
(49) *Juris Utrum.* (Glanv. xiii 24; Hib. 20.)
(50) Attaint; the assize was taken "*apud Norwicum coram H. de Bargo, justiciario nostro.*"[1] (Hib. 22.)
(51) *De fine tenendo;* the fine made "*tempore domini J. patris nostri.*" (Glanv. viii 6; Hib. 23.)
(52) *Quare impedit.*
(53) Writ of right of ward in socage.
(54) Writ of right of ward in chivalry.
(55) Assize of nuisance; vicontiel or "little" writ of nuisance; limitation "*post ultimum reditum domini J. Regis patris nostri de Hybernia in Angliam.*" (Cf. Glanv. xiii 35, 36; Hib. 7.)
(56) *Ne vexes abbatem contra libertates.*
(57) *Quod permittat* for estovers; a *justicies.*
(58) *Quod faciat sectam ad hundridum vel molendinum.*

[1] This seems a reference to an eyre of 1222.

C

A list of writs contained in a Cambridge MS. (k.k. v 33) compiled between the dates 1236 and 1267, but probably older than the Provisions of Westminster (1259), summarized by Professor Maitland in the H.L.R. iii 170-175.

The writs contained in the preceding list B are marked B.

The notes are Professor Maitland's.

"*Incipiunt Brevia de Causa Regali.*"

(1) Writ of right with many variations. (B. 1.)
(2) Writ of right *de rationabili parte.* (B. 2.)
(3) *Ne injuste vexes.* (B. 26.)
(4) *Præcipe in capite.* (B. 3.)
(5) Little writ of right *secundem consuetudinem manerii.*
(6) Writs of peace when tenant has put himself on grand assize. (B. 5.)
(7) Writ summoning electors of grand assize with variations. (B. 6.)
(8) Writ of peace when tenant of gavelkind has put himself on a jury in lieu of grand assize, and writ for the election of such a jury.[1]
(9) *Pone* in an action begun by a writ of right. (B. 4.)
(10) *Mort d'ancestor,*[2] with limitation "*post primam coronacionem Ricardi avunculi nostri.*" (B. 16.)
(11) *Quod permittat* for pasture in the nature of Mort d'ancestor, with a variation for a partible inheritance.
(12) *Nuper obiit.*
(13) Novel Disseisin,[2] with limitations "*post ultimum reditum J. Regis patris nostri de Hibernia in Angliam.*" (B. 14.) Novel Disseisin of pasture. (B. 15.)
(14) Assizes of Nuisance:[3] some being vicontial, with limitation "*post primam transfretacionem nostram in Britanniam.*" (B. 55.)
(15) Surcharge of pasture. (B. 20.)
(16) *Quo jure* for pasture.
(17) Attaint in *Mort d'ancestor* and Novel Disseisin. (B. 50.)
(18) Perambulation of boundaries.
(19) Writ of Escheat:[4] claimant being entitled under a fine which limited land to husband and wife and the heirs of their bodies, the husband and wife having died without issue.
(20) Darrein presentment. (B. 40.)
(21) Writ of right of advowson. (B. 42.) A curious variation ordering a lord to do right touching an advowson; the writ is marked "*alio modo sed raro.*"
(22) Quare Impedit. (B. 52.)
(23) Prohibition to Court Christian touching advowson. (B. 41.)
(24) Attachment against judges for breach of such prohibition. (B. 45.)
(25) *Ne admittas personam.*
(26) Mandamus to admit parson. (B. 43.)
(27) Dower *unde nihil habet.* (B. 46.)
(28) Dower *ad ostium ecclesiæ.*
(29) Dower in London. (B. 48.)

[1] The privilege of having a jury instead of a grand assize was granted to the Kentish gavelkinders in 1232. Statutes of the Realm i 225.

[2] The form seems older than 1237.

[3] This form seems newer than 1237.

[4] This is called a Writ of Escheat; but it closely resembles the Formedon in the Reverter of later times. [See above 350 n. 5; below 615 n. 4.]

(30) Dower against deforceor.
(31) Writ of right of dower.
(32) *Warrantia cartæ.* (B. 10.)
(33) *De fine tenendo:* a fine has been made "*tempore J. Regis patris nostri.*" (B. 51.)
(34) *Juris utrum* for parson. (B. 49.)
(35) *Juris utrum* for the layman. (B. 49.)
(36) Entry, the tenant having come to the land *per* a villain of the demandant.
(37) Entry *ad terminum qui preteriit:* the tenant having come to the land *per* the original lessee. (B. 11.)
(38) Entry, the tenant having come to the land *per* one who was guardian.
(39) Entry *cui in vita.* (B. 12.)
(40) Entry, the land having been alienated by dowager's second husband.
(41) Entry *sur intrusion.*
(42) Entry *ad terminum qui preteriit* for an abbot, the demise having been made by his predecessor.
(43) Entry *sine assensu capituli.*
(44) Escheat on death of bastard.
(45) Entry sur disseisin for heir of disseisee, the defendant being the disseisor's heir.
(46) Entry when the land has been given *in maritagium.*
(47) Entry for lord against guardians of tenant in socage who are holding over after their ward's death without heir.
(48) Entry for reversioner under a fine.
(49) Writ of intrusion.
(50) *Quod capiat homagium.* (B. 13.)
(51) False imprisonment: "*ostensurus quare prædictum A imprisonavit contra pacem nostram.*"
(52) Robbery and rape: "*ostensurus de robberia et pace nostra fracta,*" vel "*de raptu unde eum appellat.*" (B. 22.)
(53) Homicide: "*attachiari facias B per corpus suum responsurus A de morte fratris sui unde eum appellat.*" (B. 23.)
(54) *De homine replegiando.* (B. 24.)
(55) *De plegiis acquietandis:* "*justifices talem quod . . . acquietet talem.*" (B. 32.)
(56) *De plegio non stringendo pro debito:* do not distrain pledge while principal debtor can pay. (B. 32*a*.)
(57) *Quod permittat* for estovers: "*justifices A quod . . . permittat B rationabilem estoverium suum in bosco suo quod in eo habere debet et solet.*" Variation for right to fish: "*justifices A quod permittat B piscariam in aqua tali quam in eadem habere debet et solet.*" (B. 57.)
(58) Debt: "*justifices A quod . . . reddat B xii marcas quas ei debet,*" vel "*catallum ad valenciam xii marcarum quas* (sic) *ei injuste detinet sicut racionabiliter monstrare poterit quod ei debeat, ne amplius,*" etc. (B. 27.)
(59) Debt and Detinue before the king's justices. "*Precipe A quod . . . reddat B xii marcas quas ei debet et injuste detinet* vel *cattallum ad valenciam x marcarum quod ei detinet, et nisi fecerit . . . summone . . . quod sit coram justitiariis nostris . . . ostensurus quare non fecerit.*"
(60) Replevin. (B. 21.)

(61) Suit to mill: "*justifices A faciat B sectam ad molendinum . . . quam facere debet et solet.*" (B. 58.)

(62) Customs and services: "*non permittas quod A distringat B ad faciendum sectam . . vel alias consuetudines et servicia que de jure non debet nec solet.*"

(63) Customs and services: sheriff is not to distrain B for undue suit to county or hundred court, etc.

(64) Customs and services: "*justifices A quod . . . faciat B consuetudines et recta servicia, que ei facere debet,*" etc. (B. 25.)

(65) Customs and services, by *precipe*: "*precipe A quod faciat B consuetudines et recta servicia.*"

(66) Waste: "*non permittas quod A faciat vastum . . . de domibus . . . quas habet in custodia,* vel *quas tenet in dotem,*" etc.

(67) Waste: attach A to answer at Westminster why he or she has wasted tenements held in guardianship or in dower, "*contra prohibicionem nostram.*" (Hib. 51.)

(68) *De nativo habendo*:[1] let A have B and C his "natives" and fugitives who fled since the last return of our father King John from Ireland. (B. 17.)

(69) *De libertate probanda.* (B. 18.)

(70) *De racionabilibus divisis.* (B. 19.)

(71) *De recordo et racionabili judicio.* Let A have record and reasonable judgment in your county court in a writ of right. (B. 7.)

(72) Annuity: "*justifices A quod . . . reddat B x sol. quos ei retro sunt de annuo redditu,*" etc.

(73) *Ne vexes.* Do not vex or permit to be vexed A or his men contrary to the liberties that he has by our or our ancestor's charter, which liberties he has used until now. (B. 56.)

(74) Wardship in socage: "*justifices A quod . . . reddat B custodiam terre et heredis C,*" etc. (B. 53.)

(75) Wardship in chivalry, the guardian claiming the land: "*justifices,*" etc. Variation when the guardian is claiming the heir's person. (B. 54.)

(76) Aid to knight son or marry daughter: "*facias habere A racionabile auxilium.*" (B. 34.)

(77) Covenant: "*justifices A quod . . . convencionem . . . de tanto terre.*" (B. 36.)

(78) Sheriff to aid in distraining villains to do their services.

(79) Prohibition against impleading A without the king's writ. "*R. vic. sal. Precipimus tibi quod non implacites nec implacitari permittas A de libero tenemento suo in tali villa sine precepto nostro vel capitalis nostri justiciarii.*"

(80) *Ne quis implacitetur qui vocat warrantum qui infra ætatem est.* (B. 9.)

(81) *Ne quis implacitetur qui infra ætatem est.* (B. 9.)

(82) *Quod permittat*: "*justifices A quod . . . permittat B habere quendam cheminum,*" etc., vel "*habere porcos suos ad liberam pessonam,*" etc.

(83) Account: "*justifices talem quod . . . reddat tali racionabilem compotum suum de tempore quo fuit ballivus suus,*" etc.

(84) Mesne: "*justifices A quod . . . acquietet B de servicio quod C exigit ab eo . . . unde B qui medius est,*" etc. (B. 33.)

(85) *De excommunicatis capiendis.* (B. 35.)

[1] This form seems newer than 1237.

(86) Prohibition to ecclesiastical judges against holding plea of chattels or debt "*nisi sint de testamento vel matrimonio.*" (B. 30.)
(87) Prohibition to the party in like case.
(88) Attachment on breach of prohibition. (B. 31.)
(89) Prohibition in cases touching lay fee. (B. 28.)
(90) Recordari facias, a plea by writ of right in your county court.
(91) *Quare ejecit infra terminum.*[1] *Breve de termino qui non preteriit factum per W. de Ralee: "Si A fecerit te securum,* etc. . . . *summone,* etc. . . . *B,* etc., *ostensurus quare deforciat A tantum terre . . . quam D ei demisit ad terminum qui nondum preteriit infra quem terminum predictus (D) terram illam predicto B vendidit occasione cujus vendicionis predictus B ipsum A de terra illa ejecit ut dicit,*" etc.
(92) "*Breve novum*[2] *factum de communi assensu regni ubi de morte antecessorum deficit.*" This is the writ of cosinage.
(93) *De ventre inspiciendo.*
(94) "*Novum breve*[3] *factum per W. de Ralee de redisseisina super disseisinam et est de cursu.*" Sheriff and coroners are to go to the land and hold an inquest, and if they find a redisseisor to imprison him.
(95) "*Novum breve*[4] *factum per eundem W. de averiis captis et est de cursu.*" After a replevin and pending the plea, the distrainor has distrained again for the same cause . . . "*prædictum A ita per misericordiam castiges quod castigacio illa in casu consimili timorem præbeat aliis delinquendi.*"
(96) "*De attornato faciendo in comitatibus, hundredis, wapentachiis de loquelis motis sine breve Regis.*" A writ founded on cap. 10 of the Statute of Merton. Variation when the suit was due to a court baron.
(97) Prohibition to ecclesiastical judges in a suit touching tithes.
(98) Writ directing the reception of an attorney in an action. (B. 37.)
(99) *Præcipe in capite.* (B. 3.)
(100) Writs directing the sheriff to send knights to view an essoinee and hear appointment of attorney. (B. 38, 39.)
(101) Writ to bishop directing an inquest of bastardy, the plea being one of "general bastardy."
(102) Writ of entry sur disseisin, the defendant having come to the land *per* the disseisor.
(103) *Quod permittat* for common by heir of one who died seised.
(104) *Quare duxit uxorem sine licencia. Quare permisit se maritari sine licencia.*
(105) *Monstraverunt*[5] for men of ancient demesne.
(106) Removal of plea from court baron into county court on default of justice.
(107) Surcharge of pasture: "*summone . . . B quod sit . . . ostensurus quare superhoneral pasturam.*" (B. 20.)
(108) Patent appointing justices to take an assize.

[1] Bracton f. 220 notices this writ as a newly invented thing. He recommends, however, another form, which is a Precipe quod reddat; but the above is the form which ultimately prevailed. [See vol iii App. Ia 14.]

[2] Another of Raleigh's inventions, which we may ascribe to the year 1237. Bracton's Note Book pl. 92. [See vol iii App. Ia 9.]

[3] Given by Stat. Merton c. 3. [4] This is given by Bracton f. 159.

[5] This will hereafter be attracted into "the Writ of Right group" by the little Writ of Right for men of the Ancient Demesne. [See below vol iii App. Ia 13.]

(109) Prohibition to ecclesiastical judges against entertaining a cause in which B (who has been convicted of disseising A) complains that A has "defamed his person and estate."
(110) *De odio et hatia.*
(111) Writ of extent. Inquire how much land A held of us *in capite.*
(112) Mainprize, where inquest *de odio et hatia* has found for the prisoner.
(113) Writ of seisin for an heir whose homage the king has taken.
(114) Writ of enquiry as to whether the king has had his year and a day of a felon's land.
(115) *Warrancia diei,* sent to the justices.
(116) Extent of land of one who owes money to the Jews.
(117) Prohibition against prosecuting a suit touching advowson in Court Christian.
(118) Writ to bishop directing an enquiry when bastardy has been specially pleaded: "*inquiras utrum A natus fuit ante matrimonium vel post.*"
(119) Writ announcing pardon of flight and outlawry.
(120) Writ permitting essoinee to leave his bed. Dated A.R. 33.
(121) Abbot of N.[1] has been enfeoffed in N. by several lords who did several suits to the hundred court. You, the sheriff, are not to distrain the abbot for more suits than one, "*quia non est moris vel juri consonum quod cum plures hæreditates in unicum hæredem descenderint vel per acquisicionem aliquis possideat diversa tenementa quod pro illis hæreditatibus aut tenementis diversis, ad unicam curiam fiant secta diversa.*" Dated A.R. 43.

D

A list of writs contained in a Cambridge MS. (E.e. i 1) of the early years of the reign of Edward I., summarized by Professor Maitland in the H.L.R. iii 213-216.

The notes are Professor Maitland's.

(1) *The Writ of Right Group.* This includes the Writ of Right; Writ of Right *de rationabile parte;* Writ of Right of Dower; *Præcipe in capite; Little Writ of Right;* Writs of Peace, and writs summoning the Grand Assize or Jury in lieu of Grand Assize; writ for viewing an essoince; writs announcing appointment of attorney; *Warrantia diei; Licencia surgendi; Pone; Monstraverunt.*
(2) *The Ecclesiastical Group.* Writ of Right of Advowson; Darrein Presentment; *Quare impedit; Juris utrum;* Prohibition to Court Christian in case of an advowson; Prohibition to Court Christian in case of chattels or debts; Prohibition against Waste;[2] Prohibition in case of lay fee. Then follow seven

[1] In 1258-9 suit of court was a burning question. The Provisions of Westminster (c. 2) laid down the rule, that when a tenement that owes a single suit comes to the hands of several persons, either by descent or feoffment, one suit and no more is to be due from it. [Vol i 177; above 221.] This writ deals with the converse case in which several parcels of land, each owing a suit to the same court, come into one hand, and it lays down the rule that in this case also one suit is to be due.

[2] The reason why Waste gets enclosed in this ecclesiastical group is obvious; the action of Waste is, or has lately been, an action on a prohibition. [Above 516.]

especially worded prohibitions introduced by the note, "*Ostensis formis prohibicionum que sont de cursu patebit inferius de cis que sunt in suis casibus formate et sunt de precepto.*" After these come the *De Excommunicato capiendo* and other writs relating to excommunicates.

(3) *The Replevin and Liberty Group.* Replevin; a writ directed to the coroners when the sheriff has failed in his duty is preceded by the remark, "*Primo inventum fuit pro Roberto de Veteri Ponte*"; *De averiis fugatis ab uno comitate in alium; De averiis rescussis; De recaptione averiorum; Moderata misericordia; De nativo habendo,* the limitation is "*post ultimum reditum Domini J. Regis avi nostri de Hibernia in Angliam*"; *De libertate probanda;* aid to distrain villains; *De tallagio habendo; De homine replegiando; De minis, i.e.* a writ conferring a special peace on a threatened person.[1] *De odio et atia* (with the remark that the clause beginning with *nisi* was introduced by John Lexington, chancellor of Henry III.).

(4) *The Criminal Group.* Appeal of felony evoked from county court by *venire facias;* writ to attach one appealed of homicide by his body; writs to attach other appellees by gage and pledge.

(5) *A Miscellaneous Group. De corrodio substracto; De balliva forrestarii de bosco recuperanda; Quod attachiet ipsum qui se substraxit a custodia; Quod nullus implacitetur sine precepto Regis.* Various forms of the *Quod non permittat* and *Quod permittat* for suit of mill, etc.

(6) *Account.* Account against a bailiff ("*Et sciendum est quod filius et heres non habebit hoc breve super ballivum domini* [*corr. antecessoris*] *sui, set ut dicitur executores possunt habere hoc breve super ballivum tempore quo fuit in obsequio defuncti*"; it proceeds to give a form of writ for executors in the king's court, and then adds, "*Et hoc breve potest fieri ad placitandum in comitatu. Verumptamen casus istorum duorum brevium mere pertinet ad curiam cristianitatis racione testamenti*").

(7) *Group relating chiefly to Easements and the duties of neighbours.* Aid to knight eldest son; *De pontibus reparandis—muris—fossatis; De curia claudenda; De aqua haurienda; De libero tauro habendo; De racionabile estoverio; De chimino habendo; De communa,* with variations; Admeasurement of pasture; *Quo jure; De racionalibus divisis; De perambulacione; De ventre inspiciendo.*

(8) *Mesne, Annuity, Debt, Detinue,* etc. *De medio; De annuo reditu; De debito* (only two writs of debt, one a *precipe,* the other a *justicies;* the former has "*debet et detinet,*" the latter "*detinet*"); *Ne plegii distringantur quamdiu principalis est solvendus; De plegiis acquietandis; De catallis reddendis;* (Detinue by *precipe* and by *justicies*); *Warrantia cartæ.*

(9) *Writs of Customs and Services.*

(10) *Covenant and Fine.* The covenant in every case is "*de uno messuagio.*"

(11) *Wardship. De custodia terre et heredis; De corpore heredis habendo; De custodia terre sine corpore; Aliter de soccagio;* "*Optima brevia de corpore heredis racione concessionis reddende* [*sic*] *executoribus alicui defuncti.*"

[1] A has complained that he is threatened by B. Therefore, "prefato A de prefato B firmam pacem nostram secundum consuetudinem Anglie habere facias, ita quod securus sis quod prefato A de corpore suo per prefatum B," etc. It is a writ directing the sheriff to take security of the peace.

(12) *Dower.* Dower *unde nihil; De dote assensu patris; De dote in denariis; De dote in Londonia; De amensuracione dotis.*

(13) *Novel Disseisin.* Novel disseisin, the limitation is, "*post primam transfretacionem domini H. Regis anni*[1] *nostri in Brittanniam*"; *De redisseisina;* Assize of nuisance; Attaint.

(14) *Mort d'Ancestor and similar actions.* Mort d'Ancestor (no period of limitation named); Aiel; Besaiel ("*Multi asserunt quod hoc breve precipe de avio et avia tempore domini H. Regis filii Regis Johannis per discretum virum dominum Walterium de Merlone*[2] *tunc secretorium clericum et prothonotorium* [*sic*] *cancellarie domini Regis et postmodum cancellarium primo fuit adinventum quia propter recentem seisinam et possessionem et discrimina brevis de recto vitandum ab omnibus consilariis et justiciariis domini Regis est approbatum et justiciariis demandatum quod illud secundum sui naturam placitent*"); Cosinage; *Nuper obiit* ("*Et hoc breve semper est de cursu ad bancum in favorem petentis seisinam quod antecessor petentium habuit de hereditate sua et similiter ut vitentur dilaciones periclose que sunt in breve de recto*").

(15) *Quare ejecit infra terminum,* ascribed to Walter of Merton;[3] Writs of Escheat.

(16) *Entry and Formedon.* Numerous Writs of Entry, the degrees being mentioned (no writ "in the *post*"); Formedon in the Reverter; and a very general Formedon in the Descender.[4]

(17) *Miscellaneous Group.* Licence to elect an abbot; petition for such licence; form of presenting an abbot-elect to the king; pardons; grants of franchises; a very special writ for R. de N. impleaded in the court of W. de B.; *De languido in anno bissextili* (concerning an essoin for a year and a day in leap year); *Breve de recapcione averiorum post le Pone; Quod non fiat districtio per oves vel averiis* [*sic*] *carucarum; Ne aliquis faciat sectam ad comitatum ubi non tenetur; Ne faciat sectam curie ubi non tenetur;* some specially worded Prohibitions.

E

A list of writs contained in a MS. Register in the library of St. John's College, Oxford, dating from the early years of the reign of Henry VI.

This MS. is beautifully written on parchment, and the first numbered folio is richly illuminated. At the beginning there are thirteen blank

[1] The occurrence of this word, which may be a corruption of "avi," is not sufficient to make us doubt that in substance this register belongs to Edward I.'s reign; though possibly a feeble attempt to "bring it up to date" may have been made at a later time.

[2] Walter of Merton seems here to get the credit which on older evidence belongs to William of Raleigh [above 231].

[3] Here again Merton seems to be obtaining undue fame at the expense of Raleigh.

[4] "Præcipe R quod juste," etc., "reddat H unam virgatam terre . . . quam W dedit M et que post mortem ipsius M ad prefatum H descendere debet per formam donacionis quam prefatus W inde fecit predicto M ut dicit, et nisi fecerit," etc. What I have seen in this and other registers favours the belief that there was a Formedon in the Descender before the Statute de Donis. See Co. Litt. 19a; Challis, Real Property 69 [above 350 n. 5; on the whole matter see vol iii 18].

and unnumbered folios. On the first five of these folios there is, in a later hand, an alphabetical index, after the fashion of that found at the beginning of the printed Register. Mr. Stevenson, of St. John's College, tells me that the handwriting of this alphabetical index is of the late fifteenth century. On folios 7-12 there is written in the same handwriting as that in which the MS. is written the "Calendarium" printed below. The rest of the MS. consists of 224 numbered folios. The numbers in the MS. only reach 223, because there are two folios numbered 28. The Register itself occupies 216 folios; and, as will appear from the Calendarium, it is divided into forty-six chapters. There are blank spaces at the end of each chapter; and throughout the MS. blanks are left in various places, evidently for the insertion of other writs. Thus at the end of the Brevia de Statuto one folio and three-quarters (139-141b) are left blank. Other instances will be found at folios 12, 40, 40b, 53b, 189b, 210, and in numerous other places. The MS. cannot be earlier in date than 1430, because at f. 138, among the Brevia de Statuto, there is a writ based on the statute 8 Henry VI. c. 9; but it is probably not much later than this, as Mr. Stevenson tells me that the handwriting is of the late fourteenth century.

A comparison between the arrangement and the contents of this MS. and that of the printed Register abundantly bears out Professor Maitland's statement (above 515) that, by the beginning of Henry VI.'s reign, the Register had reached substantially its final form. Both the order and the contents are substantially similar. This will appear from the Calendarium. In this Appendix after each chapter the corresponding folios of the 1687 edition of the Register are placed in square brackets, and after each writ the number of the folio in which it occurs in the MS. Generally, the printed Register contains more writs than this MS.; but, as has been (above 518) noted, it sometimes contains writs not in the printed Register. We shall see (below, vol iii 437 n. 3) that there is an interesting writ of trespass on the case based on a non-feasance in breach of an undertaking. Sometimes, too, as we shall see, the order in which groups of writs, or in which separate writs within these groups occur, is different. But, when all deductions have been made, it is the resemblances which are the most striking. Not only are the same writs found in the same order, but also the same notes often in the same words. As instances we may compare the notes on ff. 1b, 2, 3, 5, 20, 51b, 54b, 117b, 173b of the MS. with those on ff. 2, 2b, 4b, 7b, 29b, 72b, 76b, 167, 227 of the printed Register. There are fewer notes in this MS., and often they are shorter. Even when they are shorter, they are often, as far as they go, verbatim the same. In one case, however, there is an interesting addition in this MS. At f. 14b of the printed Register there is a note to the effect that Domesday Book was made "en temps de seint Edward le roi": in this MS. at f. 9 the writer adds, "Set secundum quosdam Willelmus Conquestor in secundo Anno regni sui Anglie describi fecit in uno volumine dicto Domesday." In conclusion we shall give two instances which show perhaps more clearly than anything else both that the legal order of writs had become stereotyped and that the printed Register reproduces accurately the form of the MSS. In Chapter 24 (below 627) the writer of the Calendarium gives a writ, "Quod nimis gravis districcio non capiatur pro debito Regis," immediately after the writ, "Quod Constabularius Castri Dovorr non teneat aliquod placitum forinsecum, etc." The former writ does not occur in the MS., nor is there any space left for it: but it does occur imme-

diately after the latter writ in the printed Register. May we not infer that the legal order was so stereotyped that the writer of the Calendarium knew that this writ ought to occur in this place, and that he omitted it merely by inadvertence in his MS.? In the same chapter, at f. 133 (below 627), there is a writ, "Quod Senescallus et Marescallus non teneant placita de libero tenente de debito de transgressione, etc.," founded on the Articuli super Cartas c. 3. The reference to the statute is placed in the margin a little distance from the title of the writ. The printed Register (f. 191b) presents exactly the same feature. No doubt the MS. from which the printed Register was taken was later. There are more writs; and there is some attempt to arrange some of the Brevia de Statuto in the proper places (above 515 n. 5; below 639). But, as we have already said, it is probable that many of the features of our printed Register depend on the accidents of the MS. which went to the printers. Whether we consider the Statutes (above 427), the Year Books (above 530), or the Register, the law publishers and the printers have had a large influence on the form, and perhaps some influence on the contents, of all these the most important sources of our law.

CALENDARIUM

Capitulum primum [ff. 1-8b]

De breuibus de recto patentibus diuersimode. (1)
De ordine ponendi particulas. (1b)
De recto in custodia Regis. (1b)
De recto in London'. (2)
De recto de dote. (2b)
De recto de racionabili parte. (2b)
De recto Episcopis. (3)
Ne iniuste vexes. (3)
Quando dominus remisit Curiam Regi. (3)
Littera per quam Curia remittitur. (3)
Precipe in capite. (3)
Recordari in breui de recto cum causis diuersimodis. (3b)
Supersedeas de recordari. (4)
Pone in breui de recto in Comitatu pro petente et deforciante. (4)
Attachiamentum quando dominus non vult tenere Curiam, etc. (4)
Recordari in Comitatu Cestr'. (4b)
De errore in Comitatu Cestr'. (4b)
Recordari in Episcopatu Dunelm'. (4b)
Recordari infra libertatem quinque portuum. (5)
Prohibicio quando tenens posuit se in magnam assisam. (5)
Aliter de consuetudinibus et seruiciis. (5)
Aliter de Gauelkynde. (5)
De iurata in Curia Baronum. (5)
De magna assisa eligenda. (5b)
De essonio de malo lecti. (5b)
De licencia surgendi de malo lecti. (6)

Capitulum secundum [ff. 9-14b]

De recto secundum consuetudinem manerij diuersimode. (6b)
Attachiamentum quando dominus recusat tenere Curiam. 6b)
De videndo quod plena iusticia exhibeatur. (6b)

De recordo et racionabili iudicio habendo pro petente. (7)
De procedendo in breui de recto. (7)
Recordari secundum consuetudinem manerij pro tenente cum causis. (7)
Recordari secundum consuetudinem manerij sine breui cum causis. (7b)
Supersedeas quando tenens vocat forinsecum ad warantum. (8)
De adnullando coram Rege finem leuatum de tenementis que sunt de antiquo dominico corone. (8b)
Monstrauit pro hominibus de antiquo dominico diuersimode. (8b)
De attachiando dominum eo quod cepit bona hominum pendente attachiamento. (9)
De certificando vtrum manerium sit de antiquo dominico corone necne. (9)
De certificando per que seruicia tenetur. (9)

Capitulum tercium [ff. 15-20b]

De falso iudicio in Comitatu diuersimode. (9b)
De errore in assisa frisce forcie. (10b)
De errore in Banco Regis.[1]
De execucione iudicij in Comitatu. (11)
De warantia in seruicio Regis diuersimode. (11b)
De procedendo quando aliquis falso se essoniauit de seruicio Regis. (11b)
De clamio admittendo in itinere per attornatum, etc. (11b)
De libertatibus exigendis in itinere. (12)
De attornato in omnibus placitis et querelis in itinere. (12)
Dedimus potestatem inde. (12)

Capitulum quartum [ff. 21-26b]

De generali attornato diuersimode cum dedimus potestatem. (12b)
De attornato generali pro priore hospitalis sancti Iohannis Ierusalem in Anglia. (12b)
Aliter pro Abbate ad totam vitam suam. (13)
De Custode generali pro illo qui est infra etatem. (13)
De attornato generali in Insulis.[2] (3)
De licencia faciendi attornatum quia infirmus.[2] (13)
Proteccio cum clausula volumus diuersimode. (13b)
Proteccio cum clausula nolumus.[3] (14b)
De reuocacione proteccionis diuersimode.[3] (14)
Proteccio pro clero diuersimode. (15)
Aliter pro mercatoribus de societate bardorum.[4] (15b)
Proteccio de minis diuersimode. (15b)
Proteccio pro hospitali ad elemosinas colligendas. (16)
Aliter pro seculari. (16b)
De saluis conductibus et saluis gardiis. (17)
De requestu.[5] (17b)

[1] This writ does not occur in the MS., but a space is left for it (f. 11); the printed register has (ff. 17, 17b) a writ of error in the King's Bench and in Parliament; in this MS. the writ of error in Parliament is at f. 94b.

[2] In the reverse order in the printed register.

[3] In the reverse order in the MS.

[4] This writ does not occur in the printed register.

[5] For this writ see above 518; it does not occur in the printed register, but there are some other forms of letters of request at f. 129.

Capitulum quintum [ff. 26b-29b]

De attornato ad loquelas prosequendas sine breui diuersimode. (18)
Dedimus potestatem inde diuersimode.[1] (18)
De attornato quando factum committitur in equali manu. (19)
De attornato ad petendum se admitti ad defendendum ius tenentis ad terminum vite si contingat ipsum facere defaltam. (19)
De attornato admittendo.[2] (19b)

Capitulum sextum [ff. 29b-33b]

De recto de aduocacione diuersimode. (20)
Assisa vltime presentacionis. (20b)
Attincta inde. (20b)
Quare impedit diuersimode. (20b)
Ne admittat diuersimode. (21)
Quare non admisit diuersimode. (22)
Quare incumbrauit. (22)
Breue de vtrum diuersimode.[3] (22)
Breue quod admittat quando partes concordantur extra Curiam non obstante prohibicione.[3] (21b)
De attornato in breui de vtrum. (22b)

Capitulum vij^{m} [ff. 33b-43]

Prohibicio de aduocacione ecclesie diuersimode. (23)
Prohibicio de catallis et debitis. (23)
Prohibicio de laico feodo diuersimode. (23b)
Prohibicio de collacione scolarum. (23b)
Prohibicio de transgressione diuersimode. (23b)
Prohibicio de annuo redditu. (24)
Aliter de conuencionibus. (24)
Indicauit diuersimode. (24)
Prohibicio de decimis separatis. (24b)
Prohibicio de recognicione debitorum diuersimode. (24b)
Aliter de redditibus feodalibus. (25)
Prohibicio in diuersis aliis casibus.[4] (25b-27)
Ne quis visite[t] hospitale fundatum a Rege. (27)
Ne quis intromittat de libera Capella Regis. (27)
De non intromittendo de hospitali quod totum consistit in temporalibus.[5] (27)
Quod clerici Cancellarie non respondeant alibi quam coram Cancellario diuersimode.[6] (28, 28b)

[1] Other writs for the admission and removal of attorneys follow in the MS.

[2] The writ preceding this in the MS. is, "De eodem (i.e. admission of an attorney) pro uxore si contingat virum facere defaltam," and this writ should read, "De attornato admittendo inde."

[3] The reverse order in the MS.

[4] The various forms are as in the printed register ff. 38b-40b.

[5] After this follow writs of Prohibition as in the printed register (ff. 41b-42b, 43-44) and two others not in the printed register—"Prohibitio eo quod asseruit se diffamari pro eo quod indictatus fuit de transgressione," and "Prohibitio quum defendens in curia Regis implacitat quemcunque in curia Christianitatis" (ff. 28, 28b).

[6] There are two writs, one addressed to the sheriff of York, the other to the sheriff of London; in the printed register (f. 43) there is one writ, and writs of supersedeas based on this writ appear there at ff. 91-92.

Aliter pro seruientibus clericorum Cancellarie.[1] (28b)
Scire facias quare prohibicio non reuocetur et consultacio porrigatur.[2] (29)

Capitulum viij^m^. [ff. 44-57b]

De consultacione versus parochianum super emendacione corporis ecclesie. (29b)
De consultacionibus in diuisis [*sic*] aliis casibus.[3] (29b-40b)

Capitulum ix^m^. [ff. 58b-61]

De non residencia cum attachiamento inde. (41)
Quod clerici Regis non soluant pecuniam ad quam multantur pro non residencia. (41)
Ne quis trahatur in causam extra regnum. (41b)
Ne quis se transferat extra regnum ad respondendum super hiis quorum cognicio spectat ad Regem. (41b)
Ne exeat regnum diuersimode. (41b)
Ne quis citet clericum Regis ad respondendum personaliter coram summo pontifice super hiis quorum cognicio spectat ad Regem. (42)
De vi laica amouenda diuersimode.[4] (42)
Ne vicecomes colore mandati Regis quemquam amoueat a possessione ecclesie.[4] (42b)

Capitulum x^m^. [ff. 61-65]

Ad iura regia diuersimode. (43)
Ne indices delegati teneant placitum de aduocacione prebende quam Rex contulit. (43)
Aliter de capiendo impugnatores. (43b)
Prohibicio parti quando clericus adeptus est possessionem. (44)
Attachiamentum super ad iura regia quando Rex presentauit. (44-45b)[5]

Capitulum xj^m^. [ff. 65-71b]

De excommunicato capiendo diuersimode. (45b)
De excommunicato deliberando quia exposuit caucionem. (46b)
De caucione admittenda. (46b)
De deliberando absque caucione, etc. (47)
De excommunicato recapiendo. (47b)
Supersedeas de capiendo corpus pendente placito attachiamenti. (47b)
Supersedeas pendente appellacione diuersimode.[6] (48)
Scire facias et supersedeas in le significauit diuersimode. (48-50)
De terris tenementis bonis et catallis clerici purgati restituendis eidem diuersimode. (50)
De clerico conuicto Episcopo vel eius Commissario liberando. (50b)
De extracto ab ecclesia restituendo. (50b)
De apostata capiendo. (50b)

[1] There are two ff. numbered 28 in the MS.
[2] This writ appears in the printed register at f. 71.
[3] The various writs are very similar in kind to those in the printed register; in the MS. (ff. 37b, 38) there are three writs "de annua pensione": in the printed register (f. 47) only one.
[4] Not in quite the same order as in the printed register.
[5] Several of these writs "Ad jura regia," with attachments and a prohibition thereon, follow, as in the printed register (ff. 63-65).
[6] There are a greater variety of these writs than in the printed register.

Capitulum xij^m^. [ff. 72-77b]

De vasto in dotem versus mulierem diuersimode. (51)
De vasto versus Custodem. (51b)
De inquirendo de vasto facto in custodia. (51b)
De vasto facto per tenentem per legem Anglie. (52)
De vasto ad terminum vite vel annorum diuersimode. (52)
De vasto in feodo talliato. . (53)
De vasto contra tenentem per elegit. (53)
De vasto in le Remanere. (53b)
Quando tenens bastardus fuit et obiit sine herede de vasto pro domino cui spectat escaeta. (54)
De vasto in Gauelkynde. (54)
Aliter in London'.[1] (54)
De vasto pro indiuiso.[2] (54)
De particione facienda diuersimode.[2] (54)
De estreppamento diuersimode. (54b)

Capitulum xiij^m^. [ff. 77b-89]

De homine replegiando diuersimode. (55b)
De homine replegiando infra libertatem quinque portuum. (56)
Aliter quando balliui ceperunt aliquem transeu[n]tem per viam. (56)
De forstallario replegiando. (56)
De homine replegiando capto pro transgressione in foresta. (56b)
De parco replegiando. (56b)
Aliter de receptamento. (56b)
De bosco replegiando.[3] (57)
De addicione foreste. (57)
De aueriis replegiandis diuersimode. (57)
Non omittas propter libertatem, etc. (57b)
De aueriis capiendis in Withernamium. (58)
Non omittas in Withernamio. (58b)
De execucione facienda in Withernamio. (58b)
Pone de aueriis pro petente et deforciante cum diuersis causis. (59)
Recordari de aueriis cum causis. (59b)
De inquirendo de proprie[t]ate aueriorum vel catallorum. (60)
De recapcione aueriorum ante le pone et post. (60b)
Aliter in Curia per returnum breuis et quando loquela fuerit retornata fuerit placitanda iuxta libertates, etc. (60b)
De recapcione aueriorum post le Recordari. (60b)
De natiuis habendis. (61)
De libertate probanda. (61)
De auxilio habendo ad distringendum villanos. (61b)
De villanis Regis subtractis reducendis. (61b)
De auxilio habendo ad primogenitum filium Militem faciendum vel ad primogenitam filiam maritandam.[3] (61b)
De scutagio habendo.[3] (61b)
De moderata misericordia capienda.[3] (62)
De minis diuersimode. (62b)

[1] One of the forms of the writ of Waste in London has Thomas de Newenham's name to it.

[2] Not in quite the same order as in the printed register.

[3] In a different order in the printed register.

Capitulum xiiij^m^. [ff. 92-129b]

De transgressionibus in Comitatu diuersimode. (63b)
De transgressionibus in Banco diuersimode secundum exigenciam diuersorum casuum. (64-76)
Quod placita de transgressionibus vi et armis et contra pacem Regis factis non teneantur in minori Curia quam Regis, etc.[1] (76)
De recussu aueriorum diuersimode. (79-80)
Recordari de transgressione cum causis. (80b)
De recordo et processu de transgressione mittendis in Cancellariam, etc. (81)
De transgressionibus in quinque portubus. (81b)
De transgressionibus contra proteccionem. (81b)
Attincta de transgressione diuersimode. (81b)
Manucapcio pro imprisonato ad prosequendum attinctam. (82)
De decepcione diuersimode.[2] (82-83b)
Audita querela in decepcione diuersimode.[2] (84)
De audiendo et terminando de transgressione diuersimode. (85)
Associacio et si non omnes inde. (85b)
De inquirendo de accrochiamentis, etc. (86b)
De naui fracta, etc., si bona debeant dici Wrec. (87)
Aliter contra Ministros Regis de extorsionibus, etc., factis. (87b)
Breue de amouendo eosdem. (87b)
De bonis arestatis ne dissipentur. (87b)
De continuando processum inchoatum post mortem Capitalis Iusticiarij.[3] (88b)
De walliis et fossatis diuersimode.[3] (90)
Littere misse pro mercatoribus Anglie Comiti Flandrie. (91)
De bonis alienigenarum arestandis pro transgressione facta mercatoribus Anglie. (91b)

Capitulum xv^m^. [ff. 129b-132b]

De errore corrigendo in London' diuersimode.[4] (92)
De procedendo in loquela.[4] (93b)
De supersedendo execucioni prioris indicij pendente loquela de errore in hustengo.[4] (93b)
De ordinando quod bona illius qui sequitur breue de errore non amoueantur. Ita quod execucio prioris indicij possit fieri si affirmaretur. (94)

[1] After this writ a return is made to the writs of trespass (ff. 76b-78b). The succeeding writs are the following, and against them are placed the pages of the printed register where they occur: Waif and stray (100b), carrying away the chattels of felons, wreck (102b), fairs (103), falda prostrata (103), furcis fractis (107b), de pillorio fracto (108), hindering view of frankpledge (103b), de gurgite fracta (103b), carrying off cattle taken for an amerciament, breaking park and carrying off animals (110); also at f. 77b the writ de essendo quietum de theolonio (258) is interpolated—perhaps there is some idea of putting together the writs of trespass against franchises; we may note that f. 72b three writs of trespass based on non-feasance come together; but as in the other registers (above 520) there is not much system.

[2] In a different order in the printed register.

[3] The order is reversed in the printed register. After the first of these writs follow two more grants of commissions of oyer and terminer (vol i 274), one of which is to deal with rebellious villeins under an ordinance of Richard II.'s reign.

[4] The order of these writs is different in the printed register.

Breue Maiori et vicecomitibus ad examinandum recordum, etc., quando querens non sequitur breue suum de errore et ad faciendum execucionem si contigerit primum iudicium affirmari. (94)
De supersedendo execucioni iudicij per manucapcionem in Cancellaria.[1] (94b)
De errore in parliamento corrigendo.[2] (94b)
De errore in Hibernia. (95)
Aliter in Curia per cartam sine breui. (95)

Capitulum xvj^m^.[3] [ff. 133b-135]

De conspiracione diuersimode. (95b)
De odio et athia. (96b)
De ponendo in ball[i]um. (96b)
Manucapcio pro indictato de transgressionibus coram Justiciariis pacis. (96b)

Capitulum xvij^m^. [ff. 135-138b]

De compoto in Comitatu diuersimode. (97)
Aliter in quinque portubus. (97)
De compoto ad Bancum secundum diuersus [*sic*] casus. (97)
Dedimus potestatem quia infirmus. (97b)
De compoto in socagio. (97b)
Pone et cum causa. (97b)
Monstrauit pro priore.[4] (98)
Breue ad deliberandum captum per le Monstrauit. (98)
De recipiendo arestatum pro arreragiis compoti. (98)
De dimittendo arestatum huiusmodi per manucapcionem ad recitandum compotum coram Baronibus de Scaccario. (98b)
Quando Balliuus euasit de carcere. (99)
Commissio ad audiendum compotum Collectorum denariorum pro clausura ville. (99)
Aliter de denariis collectis pro villa pauienda et claudenda. (99)
De capiendo vtlagatum. (99b)

Capitulum xviij^m^. [ff. 139-153]

De debito in Comitatu diuersimode. (100)
De debito ad Bancum secundum diuersos casuum [*sic*]. (100)
Pone pro petente et deforciante cum causis. (101)
Recordari in Curia secundum consuetudinem, etc. (101)
Attachiamentum quando balliuus tenuit placitum post le pone. (101b)
De essendo in auxilium ad debita recuperanda.[5] (101b)
Quod mulieres[6] habeant partes suas racionabiles. (101b)
Aliter pro pueris. (102)
Quod mulieres non distringantur pro debitis virorum. (102)
Aliter de tenementis coniunctim adquisitis.[7] (102)

[1] Another form of this writ appears in the printed register in the last group (f. 89b).
[2] In the printed register this appears at f. 17b.
[3] The order of these writs is different in the printed register.
[4] There is a note against this writ in the printed register, "non est in usu."
[5] This writ does not appear in the printed register.
[6] The MS. reads "uxores."
[7] In the MS. (f. 102b) follow two writs—"Aliter de tenementis quæ tenet in dotem," and "Aliter post matrimonium contractum"—which are put together in the printed register.

De exonerando ad Scaccarium ipsum qui non heres, etc. (102b)
De idemptitate nominis diuersimode.[1] (104-105b)
Prohibicio de debito xls. sine breui cum attachiamento inde. (105b)
Supersedeas diuersimode. (106)
De recognicione debitorum per statutum mercatorium diuersimode. (107)
Quod clericus captus deliberetur. (107b)
Quod clericus non capiatur. (107b)
De deliberando clericum[2] captum sine breui. (107b)
De certificando in Cancellaria de statuto mercatorio diuersimode. (108, 109)
Audita querela.[3] (109)
Scire facias in breui de statuto stapule diuersimode.[4] (110)
De recognicione in stapula.[3] (110b)
De terris, etc., inde deliberandis. (110b)
Si recognoscat et de execucione facienda inde. (111)

Capitulum xix^m^. [ff. 153-158b]

De secta ad molendinum in Comitatu et ad Bancum. (111b)
Quod permittat villanos facere sectam ad molendinum. (111b)
De Curia claudenda.[5] (111b)
Quod permittat molere sine multura. (111b)
De molendino reparando. (111b)
De aqua haurienda et de grege adaquando. (112)
De tauro habendo. (112)
De racionabili estouerio habendo. (112)
De chimino habendo. (112)
De falda passagio et piscaria habendis. (112)
Quod permittat de communa pasture diuersimode. (112)
De scalis erigendis. (112b)
De corrodio habendo. (112b)
Quo iure. (113)
De pastura admensuranda. (113)
De secunda superoneracione. (113)
Pone pro petente et deforciante. (113)
De racionabilibus diuisis. (113b)
De perambulacione facienda. (113b)
Pone de racionabilibus diuisis. (113b)
De domo ponte stagno et guttera reparandis.[6] (113b)
De walliis et fossatis reparandis.[6] (113b)
De ponte calceto et pauimento reparandis.[6] (113b, 114)
De warantia carte. (114)
De plegio acquietando in Comitatu et ad Bancum. (114b)
Quod nullus distringatur qui non est debitor nec plegius. (114b)
Attachiamentum inde. (114b)

Capitulum xx^m^. [ff. 158b-160b]

De annuo redditu in Comitatu et ad Bancum. (115)
De robis cum furrura et pellura reddendis. (115)

[1] These writs appear in the printed register at ff. 194-196b.
[2] The MS. reads "vicarium."
[3] The order is reversed in the printed register.
[4] Other writs of Scire Facias precede.
[5] This writ is placed in a somewhat different order in the printed register (f. 155).
[6] The order is different in the printed register.

De consuetudinibus et seruiciis faciendis diuersimode. (115)
De cartis reddendis diuersimode pone inde. (115b)
Prohibicio ne placitum teneatur de detencione cartarum sine breui. (116)
De medio acquietando in Comitatu et ad Bancum. (116)
Pone inde. (116)
De non distringendo medium quando paratus est ad acquietandum. (116)

Capitulum xxj^m^.[1] [ff. 165-170]

De conuencione diuersimode secundum exigenciam diuersorum casuum. (116b)
De conuencione de Capellano inueniendo. (117b)
Recordari de conuencione. (117b)
De fine leuando de tenementis tentis de Rege in capite iuxta licenciam Regis. (117b)
Dedimus potestatem de conuencione diuersimode. (118)
Quod Iusticiarius mittat Iusticiariis de Banco cogniciones quas cepit. (118b)
Breue inde Iusticiariis de Banco quod recipiant, etc. (118b)
Quod executores mittant Iusticiariis de Banco cogniciones, etc. (119)
De transcripto pedis finis mittendo. (119)
Aliter de tenore note finis mittendo. (119)
Mittimus inde. (119b)
De tenore indictamenti mittendo. (119b)
De recordo et processu vtlagarie mittendis. (119b)
De tenore recordi et processus mittendo diuersimode. (119b)
De indictamento mittendo. (120)
De presentacionibus et indictamentis mittendis. (120)

Capilulum xxij^m^. [ff. 161-165]

De custodia terre et heredis habenda. (120)
De herede tantum, de terra tantum. (120)
De custodia racione custodie. (120b)
De custodia in socagio diuersimode. (120b)
De eieccione custodie. (121)
De intrusione in hereditatem. (121b)
De herede rapto diuersimode. (121b)
De forisfactura maritagij diuersimode. (122)
Dedimus potestatem admittendi Custodem. (122)
De valore maritagij diuersimode. (122b)
De escaeta diuersimode, de inquirendo inde. (122b)
De anno die et vasto, de seisina inde habenda. (123)

Capilulum xxiij^m^. [ff. 170-171b]

De dote vnde nichil habet diuersimode. (123b)
Attincta de dote. (123b)
De admensuracione dotis pone inde. (123b)
De cerciorando de dote. (124)
De dote amissa per defaltam. (124)
De maritagio amisso, etc. (124)
De feodo talliato, etc. (124)
Aliter ad terminum vite. (124)
Aliter per legem Anglie. (124)

[1] The order of this and the following chapter is reversed in the printed register.

Capitulum xxiiij^m^. [ff. 171b-189]

Quod nullus placitetur sine breui Regis de libero tenemento. (124b)
De non veniendo ad visum franciplegij nisi racione residencie tantummodo.[1] (124b)
De secta facienda per attornatum per litteras patentes et sine. (124b)
Littera ad faciendum attornatum. (125)
Quod tenentes in custodia ex concessione Regis quieti sint ab omni secta. (125)
Quod mulieres tenentes in dotem de huiusmodi custodiis teneant quiete. (125)
Quod breue de attornato non capiat terminum durantibus personis. (125)
Attachiamentum quando balliuus recusat recipere attornatum. (125b)
Quod tenens de herede infra etatem et in custodia Regis non distringatur ad faciendum sectam ad wapentachia diuersimode. (125b)
Quod tenens in dotem non distringatur pro releuio. (125b)
Quod Rex non tenetur facere seruicia seu debita soluere pro terris que sunt in custodia sua nec illi quibus huiusmodi custodias dimisit. (126)
Quod mulieres non faciant sectam pro dote. (126)
Quod tenens ex concessione Regis non faciat sectam. (126)
Quod vnica secta fiat, etc. (126)
De turno vicecomitis. (126)
De visu franciplegij. (126b)
Quod viri religiosi non veniant ad turnum vicecomitis. (126b)
Quod persone ecclesiastice non veniant ad visum franciplegij racione terrarum et tenementorum ecclesiis suis annexorum. (126b)
Persone ecclesiastice non veniant ad turnum vicecomitis. (126b)
Quod mulieres non veniant ad turnum vicecomitis. (126b)
Quod mulier habeat quarantenam suam et racionabile estouerium suum de communi. (126b)
Quod nullus distringatur contra formam feoffamenti. (127)
Ne fiant plures secte pro vnica hereditate inter coheredes. (127)
De contribucione facienda inter coheredes. (127b)
Quod ille qui habet eineciam faciat sectam pro se et particibus suis. (127b)
Ne vnicus heres faciat diuersas sectas pro pluribus hereditatibus. (127b)
Quod Firmarij ex concessione Regis non faciant sectam. (127b)
De Coronatore eligendo diuersimode. (127b)
Quod non eligatur Coronator nisi sit Miles. (128)
De viridariis eligendis. (128)
De supersedendo execucioni breuis quando viridarius amouetur per falsam suggestionem. (128b)
De Subvicecomite et clerico vicecomitis amouendis diuersimode. (128b)
De balliuo amouendo quia non habet terras seu tenementa in eodem Comitatu. (128b)
De eligendo Custodem maioris pecie sigilli pro mercatoribus editi. (128b)
Quod vicecomes ponat in inquisicionibus magis propinquos et magis sufficientes. (129)
Attachiamentum inde. (129)
Ne capiantur fines pro pulcre placitando. (129)
Attachiamentum inde. (129)

[1] This writ is at f. 175 in the printed register.

Quod Barones non ponantur in assisis. (129b)
Quod homines perpetuo languidi non ponantur in assisis. (129b)
Quod clerici non ponantur in assisis. (129b)
Quod homines in patria non commorantes non ponantur in assisis. (129b)
Quod homines etatem lxx annorum excedentes non ponantur in assisis. (129b)
Attachiamentum inde. (129b)
Quod homines xls. terre non habentes non ponantur in assisis. (129b)
Quod homines de antiquo dominico non ponantur in assisis. (130)
Quod homines de antiquo dominico non veniant ad visum franciplegij nec ad turnum vicecomitis. (130)
Quod quis non distringitur ad faciendum plures sectas. (130)
Quod Coronatores non ponantur in assisis. (130b)
Quod viridarij non ponantur in assisis. (130b)
Breue de Chambipartia. (130b)
Breue de manutenencia diuersimode. (131)
Attachiamentum inde. (131)
Attachiamentum quando quis ingreditur terras et tenementa manu forti. (131)
De adnullando recogniciones per vim et duriciam factas. (131b)
Quod districciones non fiant in via regia nec in feodis quibus olim ecclesie sint dotate. (131b)
Quod districciones relaxentur vsque ad diem vicecomitis per securitatem. (131b)
Quod iuratores non capiant de vna parte et de alia. (132)
Quando iuratores capiunt pro veredicto dicendo. (132)
Quod nullus Minister in Ciuitatibus in Burgis mercandiset de vinis nec victualibus. (132b)
Quod inquisiciones ad cuiuscumque querelam fiant. (132b)
Quod panis et aqua inuenia[n]tur inprisonatis. (132b)
Quod nichil leuetur pro euasione felonis quousque, etc. (132b)
Ne quis occasionetur pro tenementis que tenentur de honore adquisitis. (132b)
Quod ecclesiastica persona non amercictur secundum beneficium ecclesiasticum. (133)
Ne quis occasionetur pro aliqua re facta in prosecucione H. le despenser. (133)
Quod Senescallus et Marescallus non teneant placita de libero tenente de debito de transgressione, etc.[1] (133)
Quod Constabularius Castri Douorr' non teneat aliquod placitum forinsecum, etc. (133b)
Quod nimis grauis districcio non capiatur pro debito Regis.[2]
Quod non mandetur per magnum vel paruum sigillum Regis ad communem legem impediendam. (133b)
Quod inquisiciones que magne sunt examinacionis non capiantur in patria et de supersedendo, etc. (134)
Ne quis distringatur ad veniendum ad wapentachium nisi bis in anno ad presentandum que ad visum franciplegij pertinent. (134)

[1] This writ is founded on the Articuli super cartas c. 3 (vol i 208 n. 5); it is in the printed register at f. 191b; as in the printed register, the reference to the statute is given in the margin at some distance from the title to the writ—evidently the form of the MSS. is very stereotyped.

[2] This writ is not in the MS. nor is any blank space left for it; but it follows the preceding writ in the printed register (f. 185b).

Quod communia placita non teneantur in Scaccario. (134b)
Quod misericordia ponatur per sacramentum proborum et legalium hominum. (134b)
Quando vidua se maritat sine licencia Regis breue de seisiendo tam terras viri quam vidue sic maritate. (134b)
Quod clerici infra sacros ordines constituti non eligantur in officium. (134b)
De malefactoribus in parcis et viuariis.[1] (135) (3 Ed. I. c. 20, 21 Ed. I. st. 2)
Ne vicecomes capiat salarium ad faciendum officium suum.[2] (135) (3 Ed. I. c. 26)
Contra forstallatores vinarum et aliorum victualium.[2] (135) (25 Ed. III. st. 4 c. 3)
Quod Curia Admiralli non habeat cognicionem de contractibus, etc., factis infra corpora Comitatus. (135b) (13 Rich. II. st. 1 c. 5, 15 Rich. II. c. 3, vol i 317)
Attachiamentum inde.[2] (135b)
De liberatis pannorum et capiciorum attachiamentum.[2] (136) (1 Rich. II. c. 7, 1 Hy. IV. c. 7, 7 Hy. IV. c. 14)
Quando quis recipit aliquem in apprenticium contra formam statuti, etc., attachiamentum.[2] (136) (7 Hy. IV. c. 17)
Attachiamentum versus fabricatores falsorum factorum et munimentorum.[2] (136b) (1 Hy. V. c. 3)
De fimis amouendis.[2] (136b) (12 Rich. II. c. 13)
De proclamacione statuti Norhampton'.[2] (137) (2 Ed. III. c. 3)
Breue de statuto anni xv^mi^ Regis Ricardi.[2] (137) (15 Rich. II. c. 2)
Aliter de statuto xiij^mi^ Regis H. iiij^ti^.[2] (137b) (13 Hy. IV. c. 7)
Quod nullus artifex teneat leporarios, etc.[2] (138)
Breue de statuto anni octaui Regis H. sexti.[3] (138) (8 Hy. VI. c. 9)
Attachiamentum contra allutarios et tannatores.[2] (139) (2 Hy. VI. c. 7)
[Space for four writs here.]
Quod clerici domini Iusticiarij non contribuant solucioni x^e^ et xv^e^ pro mora sua, etc., diuersimode.[4] (142)
Quod Custos prisone de Flete non contribuat, etc.[4] (142b)
De supersedendo ad contribuendum solucioni x^e^ et xv^e^ diuersimode.[4] (143–144b)

Capitulum xxv^m^. [ff. 189-191]

De ordinacione contra seruientem. (145)
Aliter versus Magistrum et seruientem. (145)
Aliter versus Magistrum tantum. (145)
De attachiando non habentes vnde viuere quia recusant seruire. (145)
De seruiendo in estate vbi moratur in yeme. (145)
De attachiando Magistrum et seruientem qui recessit a seruicio pro maiori salario sibi promisso.[5] (145b)
[Space for one writ here.]

[1] In the printed register at f. 111b.
[2] These writs do not appear in the printed register.
[3] In the printed register at f. 289 in the miscellaneous group at the end.
[4] These writs do not appear in the printed register; but at f. 188 there is a writ "De non distringendum præbendarium." Of the last of these writs there are nine varieties, many of which are in favour of ecclesiastical persons, e.g. abbots and the master of a hospital.
[5] At ff. 191b-196 of the printed register writs "De liberate allocanda" and "De indempnitate nominis" follow.

Capitulum xxvj^m^. [ff. 196b-208b]

De assisis noue disseisine diuersimode. (146)
De Custode admittendo in assisa. (147)
De Custode amouendo. (147)
De attornato in assisa diuersimode. (147)
De panis[1] assisis coram vicecomite placitandis. (147b)
Quod permittat diuersimode. (148)
De mercato ad Bancum diuersimode. (148)
Certificacio noue disseisine diuersimode. (148b)
De attornato inde. (148b)
De venire faciendo quoddam scriptum de quo iuratores assise non fuerunt examinati, etc. (149)
Associacio noue disseisine diuersimode. (149)
Si non omnes diuersimode. (149b)
Patens ad omnes assisas iuratas et certificaciones. (150)
De admittendo in socium, etc. (150b)
Quando Iusticiarius vacare non potest de constituendo alium loco ipsius. (151)
Item post mortem vnius Iusticiarij de constituendo alium Iusticiarum, etc. (151)
Quando Capitalis Iusticiarius diem clausit extremum de constituendo alium loco ipsius, etc. (151b)
Attincta noue disseisine diuersimode. (151b-153)
Associacio in attincta. (153)
Breue ad reuocandum speciales Iusticiarios quia contra formam statuti de Norhampton'. (153)
Si non omnes in attincta. (153b)
De redisseisina. (153b)
Cum pluries de postdisseisina. (154)
De attornato in breui de redisseisina vel postdisseisina. (154)
Associacio in redisseisina vel postdisseisina. (154)
De redisseisina de communa pasture, etc. (154)
De postdisseisina diuersimode. (155)
Attincta in redisseisina. (155)

Capitulum xxvij^m^.[2] [ff. 208b-223b]

De recordo et processu in inquisicione in breui de redisseisina mittendis coram Rege. (155b)
Aliter ad errorem corrigendum in breui de postdisseisina. (155b)
Aliter in breui de redisseisina. (155b)
De attornato in breui de redisseisina quando est coram Rege ad errorem corrigendum. (155b)
De recordo et processu redisseisine mittendis coram Rege ad faciendum finem pro redisseisina vnde conuictus fuit, etc. (156)
De recordo et processu in breui de redisseisina mittendis coram Rege ad capiendum corpus et leuandum dampna, etc. (156)
De faciendo venire recordum et processum assise noue disseisine diuersimode. (156b)
De recordo et processu mittendis pro dampnis leuandis diuersimode. (157)

[1] This is a mistake for "parvis." The MS. states the rule that proceedings for small nuisances can take place before the sheriff, and then it gives specimens of writs for these proceedings.

[2] In this chapter the correspondence with the printed register is particularly close.

De recordo et processu coram vno pari Iusticiariorum inchoatis mittendis aliis Iusticiariis de nouo assignatis. (157b)
De recordo et processu omnium assisarum iuratarum et certificacionum coram vno pari Iusticiariorum inchoatis mittendis aliis Iusticiariis. (157b)
De recordo et processu assise mittendis aliis Iusticiariis de nouo assignatis ad capiendum assisam. (157b)
De recordo et processu assise mittendis coram Rege ad capiendum disseisinam propter disseisinam factam. (157b)
De recordo et processu assise mittendis coram Rege ad iudicium inde reddendum. (158)
De recordo et processu assise mittendis aliis Iusticiariis ad iudicium inde reddendum. (158)
Quod Iusticiarij habeant recordum et processum sibi missa coram se et sociis suis in proxima sessione sua ad iudicium inde reddendum. (158)
Quod Iusticiarij visis et examinatis recordo et processu sibi missis procedant ad iudicium reddendum. (158b)
De mittendo recordum et processum assise coram aliis Iusticiariis de nouo assignatis. (158b)
De recordo et processu assise mittendis ad capiendum certificacionem. (158b)
De recordo et processu habendis ad execucionem iudicij faciendam versus warantum. (158b)
De recordo et processu assise que Rex coram eo venire fecit mittendis in Cancellariam eo quod assisa arramiatur de eisdem tenementis. (159)
De mittendo recordum et processum assise Iusticiariis de nouo assignatis et eciam cartam quam pars querens dedixit. (159)
Quod Custodes breuium in communi Banco liberet vxori post mortem viri scripta que ipsi protulerunt coram Iusticiariis in probacionem accionis sue. (159)
De recordo et processu assise et eciam quadam carta dedicta habendis coram Iusticiariis in proxima sessione Iusticiariorum. (159b)
De recordo et processu assise et quiete clamancie mittendis in Cancellariam. (159b)
Quod tenentes in assisa non onerentur de dampnis quamdiu disseisitores habeant vnde dampna leuari poterunt. (159b)
Breue vicecomiti ad leuandum dampna de disseisitoribus iuxta formam statuti Gloucestr'. (160)
Quod recordum et processus per Iusticiarios de Banco missa Iusticiariis itinerantibus remittantur Iusticiariis de Banco. (160)
De recordo et processu mittendis in Cancellariam eo quod allegatur placitando in assisa quod breue de altiori natura pendet inter partes. (160)
Mittimus de recordo et processu assise coram Iusticiariis assignatis diuersimode. (160b)
Quod Iusticiarij de Banco mittant residuum recordi et processus, etc., ad errorem corrigendum diuersimode sicut alias et Cum pluries. (161)
Quod Iusticiarij procedant ad capcionem assise diuersimode. (161b)
De continuando assisam vsque ad proximam sessionem pro eo quod Thesaurarius et Camerarius non miserunt ad plenum recordum et processum que vocabantur placitando in assisa predicta. (162)
De mittendo recordum et processum omnium assisarum, etc., coram vno pari Iusticiariorum inchoata aliis de nouo assignatis. (162b)

De recordo et processu mittendis aliis Iusticiariis quando bastardus allegatur. (163)
Quando assisa arramiatur contra Maiorem et Communitatem ad excludendum ne assisa capiatur per forinsecos, etc., breue de audita querela diuersimode. (163b)
De continuando assisam diuersimode. (164)
De procedendo in assisa quia rediit, etc. (164b)
De non procedendo ad assisam Rege inconsulto. (164b)
De tenore misso in euidenciam. (164b)
De continuando attinctam quia est in seruicio Regis. (165)
De non procedendo ad assisam de tenente in custodia Regis existente Rege inconsulto diuersimode. (165)
De procedendo ad capcionem assise diuersimode. (165b)
Aliter in attincta. (166)
Quod Iusticiarij itinerantes procedant ad capcionem assise adiornate coram eis de vno Comitatu in alium. (166)
De procedendo ad iudicium diuersimode. (166)
Quod Iusticiarij procedant ad capcionem assise termino non expectato. (166)
De execucione iudicij in assisa noue disseisine et redisseisine. (166)
De fine pro redisseisina diuersimode. (166b)
De hominibus attinctis deliberandis. (166b)
Quod Iusticiarij inquirant de fraude vbi aliquis tulerit breue de transgressione vt possit calumpniare iuratam in assisa. (166b)
De supersedendo leuacioni dampnorum et deliberando captum pro transgressione ad prosequendum attinctam. (166b)

Capitulum xxviij^m^. [ff. 223b-225b]

Assisa mortis antecessoris diuersimode secundum exigenciam diuersorum casuum cum patentibus inde. (167)
De attornato inde. (167b)
Associacio ad dubitacionem audiendam. (168)
Attincta mortis antecessoris diuersimode. (168)
De recordo et processu assise mortis antecessoris mittendis. (168)

Capitulum xxix^m^. [ff. 226-227]

De auo et consanguinitate. (169)
De attornato inde. (169)
Attincta quando tenens ad terminum vite facit defaltam, etc. (169)
Nuper obiit diuersimode. (169b)
De attornato inde. (169b)
De ventre inspiciendo. (170)
Diem clausit extremum diuersimode.[1] (170)
Cerciorari de feodis et advocacionibus.[2] (171)
Mandamus.[2] (171)
De melius inquirendo diuersimode.[2] (171b)
Cerciorari super modo et causa capcionis.[3] (171b)
De seisina habenda.[3] (171b)
De terra extendenda.[3] (171b)
De etate probanda diuersimode.[4] (172)

[1] In the printed register at the end of f. 291b.
[2] Ibid at f. 293. [3] Ibid at f. 293b. [4] Ibid at f. 294b.

Capitulum xxx^m^. [ff. 227-227b]

Quare eiecit infra terminum diuersimode. (172b)
De eieccione firme diuersimode. (173)
Cerciorari super causa capcionis.[1] (173)
De inquirendo super certificacione.[1] (173)
De amouendo manum Regis.[1] (173)

Capitulum xxxj^m^. [ff. 227b-232]

De ingressu ad terminum qui preteriit diuersimode. (173b)
Dum non fuit compos mentis diuersimode. (174)
Dum fuit infra etatem diuersimode.[1] (174b)
De ingressu super disseisinam diuersimode. (174b)
De ingressu sine licencia et voluntate Capituli. (175)
Aliter sine assensu et voluntate fratrum et sororum. (175)
Breue quando tenens ad vitam disseisitur et moritur in eodem statu.[2] (175)
De ingressu de Cantaria. (175)
Aliter pro prebendario sine licencia et voluntate Episcopi et decani et Capituli. (175)
Aliter de Manerio pertinente ad Prebendarium. (175)
De officio seriantie. (175)
De ingressu super disseisinam de redditu. (175b)
De ingressu pro Episcopo. (175b)
Aliter pro Thesaurario in ecclesia Cathedrali. (175b)
Attincta in breui de ingressu diuersimode. (175b-176b)

Capitulum xxxij^m^. [ff. 232b-233]

De ingressu Cui in vita pro muliere diuersimode. (176b)
Aliter quando clamat tenere ad vitam suam. (177)
Cui in vita ante diuorcium. (177)
Causa matrimonij prelocuti. (177)
Causa matrimonij pro herede. (177)
Cui in vita pro herede. (177)

Capitulum xxiij^m^. [ff. 233b-234]

De intrusione post mortem tenentis in dotem. (177b)
Aliter quando vxor recuperauit dotem. (177b)
Aliter ex assignacione Capitalis domini feodi. (178)
De intrusione post mortem tenentis per legem Anglie (178)
Aliter post mortem tenentis ad vitam. (178)

Capitulum xxxiiij^m^. [ff. 234b-237]

De ingressu per tenentem in dotem. (178b)
De dote recuperata. (178b)
De ingressu per tenentem per legem Anglie. (178b)
Aliter pro tenente ad terminum vite. (178b)
De dote recuperata viuente viro quando dicebatur mortuus fuisse.[2] (179)

[1] Inserted in the Calendarium by a later hand ; but in the MS. it is written in the same hand.

[2] Not in this place in the printed register.

De ingressu per tenentem in dotem super statutum Gloucestr'. (178)
Aliter quando mulier recuperauit dotem et alienauit. (179)
De ingressu per tenentem per legem Anglie in consimili casu statuti Gloucestr'. (179b)
Aliter per tenentem ad terminum vite in consimili casu statuti Gloucestr' diuersimode. (179b)

Capitulum xxxv^m^. [ff. 237b-238]

Cessauit per biennium diuersimode. (180b)
Cessauit de feodi firma.[1] (180b)
Aliter contra personam. (181)
De tenementis alienatis contra formam collacionis. (181)
Cessauit de obitu. (181)
Aliter de Cantaria et liminari [*sic.*] (181)

Capitulum xxxvj^m^.[2] [ff. 238b-244]

Forma donacionis in le descendere diuersimode. (181b-183b)
Forma donacionis in le Reuerti diuersimode. (183b-184)
Forma donacionis in le Remanere diuersimode. (184-185)

Capitulum xxxvij^m^. [ff. 244b-247]

De tenementis legatis in Ciuitatibus et Burgis diuersimode. (185b)
Audita querela inde. (185b)
De testamento probando diuersimode. (186)
De tenementis legatis sub condicione diuersimode. (186b)

Capitulum xxxviij^m^. [ff. 247-258b]

Ad quod dampnum de Cantaria diuersimode. (187)
De terra danda Abbati et Conuentui in escambium. (187b)
Aliter in partem satisfaccionis diuersimode. (188b)
De redditu assignando pro officio mortuorum, etc. (189)
De terra data pro inhabitacione fratrum. (189)
De tenementis datis ad prebendam faciendam.[3] (189)
De reuersione concedenda. (189)
Quod executores possint dare Capellano tenementa legata per testatorem. (189)
De tenementis dandis fratribus in elargacionem mansi sui. (189)
De obligando Manerium districcioni. (189)
Aliter quando tenentes tenentur de Rege in capite de feoffando alios et heredes suos. (189b)
Aliter diuersimode secundum diuersitatem casuum. (190)
De aqua trahenda et fossato faciendo ad molendinum de aqua Regis. (190b)
De antiqua trenchea obstruenda et noua facienda. (191)
De assisa panis et ceruisie habenda et de assaia mensurarum et ponderum aliter diuersimode. (191)
De quadam domo religiosorum fundanda, etc. (191b)
De libertatibus concedendis. (192)
De vacua placea Regis concedenda. (192)
De aque ductu et conductu aque faciendis. (192b)

[1] Following this writ in the MS. (f. 181) is "Cessavit de Cantaria."
[2] Blanks are left after each of the writs in this chapter.
[3] For "faciendam," MS. reads "augmentandam."

De venella danda fratribus in elargacionem mansi. (192b)
De semita includenda. (192b)
De terra adquisita sine licencia Regis in le rehabere diuersimode. (192b)
De seruiciis remissis et quietum clamatis. (193)
De reuersione concessa et ea ingressa sine licencia per quod seisitur in manum Regis in le rehabere diuersimode. (193b)
De balliua forestarie que de Rege tenetur in capite diuersimode. (194)
De vasto includendo per certam arentacionem ad Scaccarium reddendam diuersimode. (194-195)

Capitulum xxxix^m^. [ff. 258b-261b]

De essendo quietus de theolonio diuersimode. (195b)
Attachiamentum super balliuis.[1] (195b)
Quod homines de an[ti]quo dominico corone non contribuant expensis Militum. (197)
Quod natiui non contribuant expensis Militum. (197)
Quod clerici de Cancellaria non contribuant expensis procuratorum veniencium ad Parliamentum. (197)

Capitulum xl^m^. [ff. 262-263b]

De libertatibus allocandis diuersimode. (197b-198b)
Aliter pro Baronibus quinque portuum. (198b)
De cerciorando de libertatibus allocatis.[2] (199)

Capitulum xlj^m^. [ff. 264-266]

De corrodio habendo diuersimode. (199, 199b)
Attachiamentum inde. (200)
De corrodio transferendo de vno in alium. (200)
De annua pensione. (200)
Littera de annua pensione. (200)
De primo beneficio ecclesiastico habendo. (200b)
De pensione concessa ad Scaccarium Regis. (200b)

Capitulum xlij^m^. [ff. 266-268b]

De inquirendo de idiota diuersimode. (200b, 201)
De idiota coram consilio ducendo ad examinandum. (201)
De leproso amouendo. (201b)
De vicis et venellis mundandis. (201b)
De exonerando pro rata porcionis tenure diuersimode. (201b)

Capitulum xliij^m^.[3] [ff. 303-306b]

De nominacione facta per Regem. (202b)
De nominacione facta per Regem reuocanda. (202b)
De admittendo presentatum per Abbatem ad nominacionem Regis. (202b)
Presentacion per Regem quando nominatur ei, etc. (202b)
De permutacione per nominacionem. (202b)

[1] Several other writs follow, corresponding to the printed register ff. 258b-260b.
[2] Not in this place in the printed register.
[3] In the printed register the substance of chapter xliv follows,

Presentacio per Regem diuersimode. (202b)
De Prebenda data. (203)
De assignando stallum in choro. (203)
De permutacione diuersimode. (203)
De collacione heremitagij. (203)
De ducendo in corporalem possessionem. (203)
De Cantaria et prepositura datis. (203)
De hospitali dato. (203b)
De ducendo in corporalem possessionem. (203b)
De intendendo Custodi. (203b)
Presentacio per Abbatissam. (203b)
Aliter per laicum patronum. (203b)
Reuocacio presentacionis diuersimode. (203b)
De ratificacione diuersimode. (203b)
Reuocacio ratificacionis. (203b)
Littere ad innotescendum recuperacionem Regis, etc.[1] (204)
Littere Canonici ad exercendum iurisdiccionem ordinariam. (204b)
Littere patentes ad conferendum beneficia domino in remotis agente. (204b)
Littera procuratoria, etc., ad resignandum. (205)
Forma resignacionis. (205b)
Protestacio redeundi. (205b)

Capitulum xliiij^m^. [ff. 268b-276b]

Manucapcio pro indictato de latrocinio coram vicecomite ex officio diuersimode. (206)
Manucapcio pro appellato viuente appellatore. (206b)
Aliter post mortem probatoris quia non est notorius latro. (206b)
Aliter diuersimode. (206b, 207)
Aliter pro indictato coram Custodibus pacis. (207)
De mittendo indictamentum inde coram Rege ad deliberandum indictamentum coram Custodibus pacis. (207)
Breue inde vicecomiti ad mittendum corpus indictati. (207b)
Manucapcio pro notorie suspecto de feloniis et maleficiis. (207b)
Aliter de forstallariis. (207b)
Aliter ad prosequendum appellum et breuia de falso iudicio. (207b)
Aliter pro Abbate eo quod maliciose fuit appellatus omittendo nomen dignitatis. (208)
Audita querela inde. (208)
Aliter pro capto per statutum mercatorium pro eo quod soluit partem debiti et de parte habet scriptum relaxacionis. (208)
Aliter de transgressionibus feloniam non tangentibus. (208b)
Manucapcio pro capto per statutum mercatorium ad prosequendum decepcionem et maliciam, etc. (208b)
Aliter pro illo qui captus est pro notificacione bulle in Cancellaria essendi coram consilio Regis in proximo Parliamento. (208b)
Aliter pro illo qui est in exigendis in breui de audiendo et terminando.[2] (209)
De supersedendo exigendis pro illo qui manucepit pro quodam arramiato coram Rege in Banco. (209)
Aliter pro arectato coram Custodibus pacis. (209)
Aliter in duobus breuibus de diuersis placitis, etc. (209b)
De capto per le capias per manucapcionem, etc., deliberando. (209b)

[1] After this follow several more forms of ratifications.
[2] This writ does not appear in the printed register.

Supersedeas capcioni corporis diuersimode. (209b)
De supersedendo exigendis in breui de debito.[1] (210)
Supersedeas in breui de ordinacione versus seruientem. (210)
Aliter in breui de capias versus Magistrum.[2] (210)
[Space for four writs here.]
Supersedeas pro seruiente domini ad Parliamentum Regis venientis diuersimode.[3] (211)

Capitulum xlv^m^. [ff. 278b, 279]

De attornato vicecomitis pro profro faciendo admittendo. (211)
De respectu compoti vicecomitis habendo. (211b)
De lanis de crescencia Wallie traducendis absque custuma iterato soluenda quia semel soluta erat. (211b)
De bilanceis deferendis. (211b)
De mensuris et ponderibus ne quis bis puniatur pro vno delicto diuersimode. (212)

Capitulum xlvj^m^.[4] [ff. 287b, 288-313]

Carta pardonacionis se defendendo. (212b)
Cerciorari inde. (212b)
Aliter per infortunium. (212b)
De pardonacione vtlagarie, diuersimode. (213-214)
De tenore recordi et processus vtlagarie mittendo diuersimode. (214b)
Cerciorari si littere patentes, etc., allocate existant. (215)
De errore corrigendo super vtlagariam diuersimode. (215b)
[A space is left for four more writs.]

F

A summary of the Register in its final form.

The following summary is taken from the edition of the Register published in 1687.

(1) Writ of Right Group (ff. 1-29b).

This includes the writ of right patent (ff. 1-2), writ of right of dower (f. 3), writ of right quando dominus remisit curiam (f. 4), ne injuste vexes (f. 4), præcipe in capite (f. 5), writ of right close (ff. 9, 10), monstraverunt (f. 14). In addition there are many writs connected with the proceedings which may take place in a writ of right—such as pone, recordari facias (ff. 5b, 6), writs connected with the Grand Assize (ff. 7b, 8), false judgment (ff. 15, 16), accedas ad hundredum (f. 15b), error (ff. 7, 16b-17b), attachments and protections (ff. 22b-26b), writs to admit attorneys (ff. 21, 22, 26b-29).

(2) The Ecclesiastical Group (ff. 29b-72).

This includes the writ of right of advowson (f. 29b), quare impedit (f. 30b), ne admittas (f. 31), quare non admisit (f. 32), quare incumbravit (f. 32b), the assize of darrein presentment (f. 30) and the assize utrum (f. 32b). There are a great variety of writs of prohibition (ff. 33b-44) and of consultation (ff. 44-58).

[1] A similar supersedeas in a writ of trespass precedes this writ.
[2] The order is different in the printed register.
[3] This writ does not appear here in the printed register.
[4] The following sections in the printed register are omitted: ff. 280-283b containing writs of Prohibition, and ff. 283b-287b containing writs of Certiorari.

There are several writs founded on the mediæval statutes directed against the court of Rome, *e.g.* ne quis trahatur in causam extra regnum (f. 60), ne quis se transferat extra regnum ad respondendum super aliquibus quorum cognito spectat ad regem (f. 60b). Then follow the writs de excommunicato capiendo and de excommunicato deliberando (ff. 65, 65b), and other writs connected therewith ; writs quod clericus habeat terras tenementa bona et catalla post purgationem ; and writs de apostata capiendo (71b).

(3) Writs connected with the subject of Waste (ff. 72-77b).

Various writs of waste are given (ff. 72-76). A specimen of a writ of waste as between tenants holding pro indiviso having been given (f. 76), writs de partitione facienda follow (ff. 76, 76b). A return is then made to the subject of waste in the various writs quod vastum et estrepamentum non fiat pendente placito (ff. 76b-77b) which follow.

(4) Writs connected with personal liberty and pecuniary obligation to the state (ff. 77b-88b).

This group includes various writs de homine replegiando (ff. 77b-79) and de homine capto in withernamium (ff. 79, 80, 80b). Then follow the closely connected writs of replevin for cattle—de averiis replegiandis (f. 81), de proprietate probanda (f. 83), and de averiis captis in withernamium (f. 82). A return is made to the subject of personal liberty by the writ ad deliberandum hominem captum pro levi suspitione (f. 83b). Writs of pone and recordari connected with the foregoing writs then follow. The writs de moderata misericordia and de auxilio habendo (ff. 86b, 87) refer to pecuniary obligation. These are followed by the writ de nativo habendo (f. 87), de libertate probanda (f. 87b), and other writs to get aid of or to distrain villeins. A return is made to pecuniary obligation in the writ de scutagio habendo and the commission to levy scutage (ff. 88, 88b).

(5) Writs connected with quasi-criminal or criminal liability (ff. 88b-134b).

This group begins with the writ de minis in various forms (ff. 88b-89b) and connected writs. Among them is interpolated a writ de securitate invenienda quod se non divertat aliquis versus partes exteras sine licentia regis. The writ of trespass is introduced by a petition of the clerks of the Chancery that they shall not be impleaded except in the Chancery (ff. 90b, 91). We then get in great variety writs of trespass and trespass on the case (ff. 92-112). There are only a few specimens of assumpsit (ff. 105b, 108, 109b, 110, 110b), only two of which (f. 109b) are for non-feasance. These are followed by various writs de deceptione curiæ (ff. 112-114), then follow writs of audita querela adapted to various cases (ff. 114-116b). Various writs of rescous are then given. A return is made to trespass, and writs of attaint upon actions for trespass follow (ff. 121-123). These are followed by the commission of oyer and terminer and various documents connected therewith (ff. 123-128b).

At f. 129 there is interpolated a specimen of letters of request to a foreign prince to do justice to an English merchant for a wrong committed in the foreign country, and following it

(ff. 129, 129b) there is a writ to arrest the goods of a foreign merchant for wrongs done to an English merchant. Probably these documents are inserted here because they are connected with the subject of trespass. For the same reason we have (ff. 129b-132) writs of error in actions of trespass from the Hustings court, from the court of the Staple, and from the King's Bench in Ireland.

The writ de odio et atia follows (f. 133b) because it is closely connected with the criminal law; and it is followed by the writ of conspiracy (f. 134).

(6) Writs connected with personal liability not arising out of criminal or quasi-criminal wrongs (ff. 135-153).

This section begins with various writs of account (ff. 135-139). Then follow writs of debt and detinue together—various distinctions as to their proper mode of user being drawn in the notes—and proceedings connected therewith (ff. 139-142). The subject of debt has suggested the idea of the liability of executors and administrators. This leads to the insertion at f. 142b of writs de rationabilibus partibus bonorum for a wife and for children. Then follow writs ordering that a woman holding as tenant in dower or jointly enfeoffed with her husband be not distrained for her husband's debts, and a writ to exonerate from liability an heir in tail (ff. 142b-144b). Writs of supersedeas to the sheriff if the debt is over 40s., and various other similar writs adapted to other cases follow next (ff. 144b-146b). Various writs are then given relating to the processes by way of Statute Merchant (ff. 146b-150b) and Statute Staple (ff. 151-153).

(7) Writs relating to various obligations connected with the tenure of land (ff. 153b-164b).

This group comprises a very miscellaneous collection of writs. The following are some of the most important specimens: Secta ad molendinum (f. 153b), and writs of quod permittat connected therewith (ff. 155, 156b); writs relating to the repairs of bridges, houses, and roads (ff. 153b, 154); writs of quo jure, and admeasurement of pasture (f. 156b); warrantia cartæ (f. 157b), de plegiis acquietandis (f. 158), de annuo redditu (f. 158b), de consuetudinibus et servitiis (f. 159), de cartis reddendis (f. 159b), de medio (f. 160), de custodia commissa (f. 161), de recto de custodia (f. 161b), de ejectione custodiæ (f. 162), de herede rapto (f. 163), de forisfactura maritagii (f. 163b), escheat (f. 164b).

(8) The Writ of Covenant (ff. 165-170).

There are various specimens of writs of covenant—the first, it may be noted, is a covenant to convey a manor with its appurtenances and an advowson. Then follow various writs incidental to actions of covenant brought for the purpose of levying fines (ff. 167-170).

(9) Writs relating to Dower (ff. 170-172).

In this group we get various writs of dower unde nihil habet (ff. 170, 170b), the writ of attaint after an action for dower (ff. 170b, 172), admeasurement of dower (f. 171).

At ff. 172b, 173 there are writs for admitting attorneys to perform suit of court, which would seem properly to fall within the next following group.

(10) Brevia de Statuto (ff. 173b-196).
This is a most miscellaneous group, as the name implies. The writs relate, for the most part, to matters of public law. Thus we get writs relating to suits of court, elections of foresters and verderers, to fraudulent feoffments, to unlawful distraints in the highway, to the encroachments of papal jurisdiction, to bribery of jurors, to the Statutes of Labourers, to collecting the wages of knights of the shire. At the end there are a group of writs which more directly concern the Exchequer (ff. 192-196). Writs which more directly concern private law are writs directed against maintenance (f. 182b), against forcible entries (ibid), against champerty (f. 183), and against duress (f. 183b).

(11) The Possessory Assizes and writs connected therewith (ff. 196b-227b).
This group begins with the assize of novel disseisin (f. 196b), and the assize of nuisance (f. 197b-199b), and various proceedings connected therewith, such as writs of certification, association, attaint, error (ff. 200-206). Then follow writs of redisseisin (ff. 206b, 207b), and postdisseisin (f. 208); and various proceedings which might be incidental to all this group of writs—procedendo, supersedeas, mittendo, etc. (ff. 208b-223). At f. 223b we have the assize of mort d'ancestor, and various proceedings thereon. The closely connected writs de avo, proavo, consanguineo and nuper obiit follow (ff. 226, 226b); and as incidental to them the writ de ventre inspiciendo (f. 227). The last two writs are quare ejecit and ejectio firmæ (ff. 227, 227b).

(12) The Writs of Entry (ff. 227b-238).
The first writ of entry, ad terminum qui præteriit (f. 227b), connects this group with the last. Then follow the other writs in order, accompanied by various writs incidental to them—the writ of entry in the post, dum fuit non compos mentis, entry in the per and cui, dum fuit infra ætatem (f. 228, 228b), sur disseisin (f. 229), de officio serjeantiæ (f. 231), cui in vita (f. 232b), intrusion (f. 233b), in consimili casu (f. 236), ad communem legem (ibid), cessavit per biennium (f. 237b, 238).

(13) The Writs of Formedon (ff. 238b-244).
At ff. 238b-242 we have writs of formedon in the descender, at f. 242 similar writs in the reverter, and at f. 243 similar writs in the remainder. Following these writs, by a not unnatural transition, come the writs de tenementis legatis (ex gravi querela) (ff. 244b-247).

(14) The Miscellaneous Group (ff. 247-321).
This group comprises a most miscellaneous collection of documents, any of which might come before the courts in the course of legal proceedings. Some of them have already occurred in earlier parts of the book, in relation to special writs there described, *e.g.* de apostata capiendo (f. 267), certio rari (ff. 283b-289b). As illustrations we may mention the following: Ad quod damnum (ff. 247-257b), de essendo quietum de theolonio (257b-262), de libertatibus allocandis (f. 262), de corrodio habendo (f. 264), de annua pensione (f. 265b), de inquirendo de idiota (f. 266), protections (ff. 279b-283b), pardons (ff. 289b-290b, 309-312), de terra extendenda and de ætate probanda (f. 293b), de licentia eligendi (f. 294b), oaths of

sheriffs and other officials (f. 302b), nomination by the king to a benefice (f. 303), ratifications by the king of appointments to benefices (f. 304), resignations of benefices (f. 306), certain writs used in the Chancery relating to the surrender or division of property when the heir or heirs attain their majority (ff. 313-321).

G

THE WRITS CONTAINED IN THE OLD NATURA BREVIUM

Those which also appear in the Novæ Narrationes are marked with the letter N.; and those which appear in the Articuli ad Novas Narrationes are marked with the letters A.N.

Right Patent. N. A.N.
Right in London.
Right of dower. N. A.N.
Dower unde nihil habet. N. A.N.
Admeasurement of dower. N. A.N.
Of right de rationabili parte. N. A.N.
Right close.
Præcipe in capite.
Monstraverunt. N.
Ne injuste vexes. N. A.N.
Right Quando dominus remisit curiam.
De executione judicii.
False judgment.
Error.
Dedimus potestatem (de attornato faciendo). N.
Protection.
Protection cum clausula "nolumus."
Right of advowson. N. A.N.
Darrein presentment.
Quare impedit. N. A.N.
Ne admittas.
Quare non admisit. N.
Quare incumbravit. N.
Juris utrum.
Prohibition. N. A.N.
Indicavit. N.
Consultation.
De vi laica removenda.
De excommunicato capiendo.
De excommunicato deliberando.
Waste. N. A.N.
Estrepement of Waste.
De homine replegiando.
Replevin. N. A.N.
Non omittas.
De capiendo in withernamio.
Recaption. N.
De nativo habendo. N. A.N.
De libertate probanda. A.N.
De moderata misericordia. N.
Trespass. N.
Disceit.
Rescous. N.
Oyer and Terminer.
Error (from the J.J. of assize).
Conspiracy. N. A.N.
Account. N. A.N.
Debt. N. A.N.
Detinue. N.
Detinue of charters. N.
Audita Querela.
Si recognoscat.
De executione facienda.
Secta ad molendinum. N. A.N.
Quod permittat. N. A.N.
Quo Jure. N. A.N.
De admensuratione pasturæ. N. A.N.
De secunda superoneratione pasturæ.
De rationabilibus divisis. N. A.N.
De perambulatione facienda.
Annuity. N. A.N.
De catallis nomine districtionis captis reddendis.
Customs and Services. N. A.N.
Mesne. N. A.N.
Fresh force.
Ex gravi querela.
De communi custodia. N.
Intrusion (or ejectment) de garde. N. A.N.
De valore maritagii.
Forfeiture of marriage. N.
Ravishment of ward. N. A.N.
Escheat. N. A.N.
Covenant. N. A.N.

De fine levando.
Contra formam feoffamenti. N. A.N.
De contributione facienda. N. A.N.
Novel disseisin. A.N.
Redisseisin.
Postdisseisin.
Nuisance. N. A.N.
De parvo nocumento.
Attaint.
De certificatione novæ disseisinæ.
Mort d'Ancestor. A.N.
Ayel. N. A.N.
Nuper obiit. N. A.N.
Decies tantum.
Quare ejecit. N. A.N.
Ejectio firmæ. N. A.N.
Entry ad terminum qui præteriit. N. A.N.
Entry dum fuit non compos mentis. N. A.N.
Entry dum fuit infra ætatem. N. A.N.
Entry super disseisin in le quibus. A.N.
Entry super disseisin in le per. N. A.N.
Entry super disseisin in le per and cui. N. A.N.
Entry in le post. A.N.
Entry sine assensu capituli. N. A.N.
Entry sur cui in vita. N. A.N.
Entry cui ante divortium. N. A.N.
Entry causa matrimonii prælocuti. N. A.N.
Intrusion. N.
Entry ad communem legem. N.
Entry in casu proviso. N. A.N.
Entry in consimili casu. N.
Cessavit per biennium. A.N.
Cessavit per biennium de fœdi firma. A.N.
Cessavit de Cantaria per biennium. N. A.N.
Contra formam collationis. N. A.N.
Formedon in the descender. N. A.N.
Formedon in the remainder. N. A.N.
Formedon in the reverter. N. A.N.
De partitione facienda. N. A.N.
Præmunire facias.
Quare ei deforceat. N. A.N.
Warranty of charters. N. A.N.
Diem clausit extremum.
De ætate probanda.
Quominus. N. [forbidding waste whereby a tenant cannot get his reasonable estovers].
Ad quod damnum.
Quo Warranto.
De indemnitate nominis.
Right sur disclaimer. N. A.N.
Scire facias.
Fieri facias.
Elegit.
Habere facias seisinam.
Capias ad satisfaciendum.
Capias utlagatum.
Writ to enquire into the goods of the outlaw.
Quid juris clamat.
Per quæ servitia.
Quem redditum reddit.
Venire facias.
[Notes as to challenges to the jury.]
Nisi prius.
Quale jus.
Cape magnum.
Cape parvum.
Cape ad valentiam.
Sequatur sub suo periculo.
Champerty.

There is a table at the end giving the process proper to the various writs, and some verses which are meant to serve as a memoria technica.

Almost all the writs upon which declarations are given in the Novæ Narrationes occur in the Old Natura Brevium. The former tract often contains alternative forms for different cases, and states of fact, together with some precedents for appeals of felony; and it deals, as we might expect, more peculiarly with original writs. Much the same remarks apply to the Articuli ad Novas Narrationes. It will be seen that the writs and the process upon them with which it deals are almost identical with those which occur in the Novæ Narrationes.

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